

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF PENNSYLVANIA

IN RE: ) Case No. 09-md-02081  
)  
) Philadelphia, PA  
) July 22, 2015  
BLOOD REAGENTS ANTITRUST )  
LITIGATION ) 9:46 a.m.-6:46 p.m.

ORAL ARGUMENTS  
BEFORE THE HONORABLE JAN E. DUBOIS

APPEARANCES:

For Plaintiffs: JEFFREY CORRIGAN, ESQ.  
JEFREY SPECTOR, ESQ.  
JAY COHEN, ESQ.  
For Defendants: PAUL ST. ANTOINE, ESQ.  
JOANNE LEWERS, ESQ.  
RICHARD COE, ESQ.  
Others Present: JEFFREY KODROFF, ESQ.  
JONATHAN SCHWARTZ, ESQ.  
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1 P R O C E E D I N G S

2 THE CLERK: All rise.

3 THE COURT: Good morning, everyone.

4 ALL: Good morning, Your Honor.

5 THE COURT: Please be seated.

6 I call the case of In Re: Blood  
7 Reagents Antitrust Litigation, MVM No. 09-2081. You  
8 scheduled day two of oral argument on the issues on  
9 remand for today.

10 Is the plaintiff's side ready to  
11 proceed?

12 MR. CORRIGAN: Yes, Your Honor.

13 THE COURT: Is the defense ready to  
14 proceed?

15 MR. ST. ANTOINE: Yes, Your Honor.

16 THE COURT: Before we proceed with  
17 phase 2 or bucket 2, I have some concerns about what  
18 developed yesterday. And I'm focused on the handling  
19 of costs by Dr. Beyer and the difference between the  
20 standard costs and the CNIS cost not included in  
21 standard costs.

22 I'm also concerned about what Dr.  
23 Bronstein (ph) said regarding Dr. Beyer's handling of  
24 costs. Liz, let's start there. Where is that? It  
25 wasn't here.

1 (Court and clerk confer)

2 THE COURT: And I should add a fourth  
3 concern. As far as I can determine, with all the  
4 briefing and in all the years that have transpired  
5 since class certification was first addressed, this is  
6 the first time this issue has been raised. Not only  
7 that, but the difference between standard costs and  
8 costs not included in standard costs, apparently was  
9 set forth in a letter that never was provided to the  
10 Court until yesterday. And we've given back the  
11 letter to the defense side.

12 Yesterday I asked that two things be  
13 provided to me today. One is a copy of that letter.  
14 It was a letter written by you -- well, it was written  
15 by the defense side. I don't know whether Mr. St.  
16 Antoine wrote the letter, I think he did. I think  
17 it's your letter.

18 MR. ST. ANTOINE: I did, Your Honor.

19 THE COURT: All right, good.

20 MR. ST. ANTOINE: And we do have copies  
21 of it.

22 THE COURT: Fine, I'd like that.  
23 Number one. And number two, from the defense, from  
24 the plaintiff's side, I want the list of the documents  
25 that support the plaintiff's position on the extension

1 of the OCV from two years to the end of 2005.

2 All right. And I gather you don't have  
3 that.

4 MR. CORRIGAN: Not at the moment, Your  
5 Honor. I wasn't sure when you wanted that, but we'll  
6 certainly get it to you shortly.

7 THE COURT: Well, let me tell you,  
8 everything I want in this case, I want quickly.

9 MR. CORRIGAN: Okay.

10 THE COURT: Only because as I said  
11 earlier we're on a tight schedule.

12 MR. CORRIGAN: Understood.

13 THE COURT: In some situations, we can  
14 take our time, not with respect to this -- these  
15 issues that were raised on remand. So, Mr. St.  
16 Antoine, you can hand up that letter.

17 First, let me address my concerns and  
18 we'll decide when to handle --

19 MR. ST. ANTOINE: Your Honor, can I add  
20 something with respect to the September letter? Just  
21 for the record, my understanding that it is Exhibit  
22 172 to plaintiff's class certification, Plaintiff's  
23 Exhibit 172. So I believe it is already part of the  
24 Court's record.

25 THE COURT: Well, the record is

1 voluminous, and the record on -- I don't recall any  
2 focus on this. I know I didn't mention it in my class  
3 certification opinion. And the exhibits, the way the  
4 exhibits were presented yesterday made it very  
5 difficult to follow because a number of the exhibits  
6 were not included in the books of exhibits to be  
7 considered on remand. They were considered -- they  
8 were in the exhibits submitted in connection with the  
9 original class certification briefing.

10 MR. ST. ANTOINE: Yes. Your Honor, I  
11 think we are partly responsible with plaintiff's  
12 counsel for that. I think it was an effort  
13 collectively to streamline the number of documents  
14 that we would address at yesterday's and today's  
15 hearing, but I think it may have backfired.

16 THE COURT: Well, maybe a little bit.  
17 I'm not finding fault. My goal is to get to the heart  
18 of this issue. And so I have the letter, good.

19 MR. CORRIGAN: Your Honor, may I just  
20 make one point?

21 THE COURT: Yes.

22 MR. CORRIGAN: Just one. In your  
23 opinion, and we have a slide of this later, you said  
24 Dr. Beyer used Immucor standard costs for both  
25 defendants because Ortho has represented that its cost

1 data is unreliable.

2 THE COURT: I'm not sure. That was  
3 based on what the plaintiffs argued, but we're going  
4 to get to the heart of the under liability. There  
5 were a lot of issues that were raised in the remand  
6 briefs. This, in my judgment, is the most important  
7 of those issues. And I want to get to the heart of  
8 it.

9 First, Bronstein testified, and I'm  
10 looking at defense exhibit -- well, it's his -- I  
11 think it's his -- at the hearing? Yes, at the class  
12 certification hearing on July 26th, 2012, at the top  
13 of page 245, and it appears on Plaintiff's slide 37.  
14 I don't think the entire part of the transcript that  
15 I'm going to read appears.

16 This is the defense expert,

17 "What was the basis of Dr. Beyer's  
18 conclusion that he wasn't going to rely  
19 on Ortho's cost data?

20 "A There was information  
21 provided from Ortho that they  
22 recharacterized costs from time to time  
23 and as a result, the cost data that you  
24 had requested wouldn't be comparable  
25 from year to year.

1                   "Q    So would that be unreliable  
2                   data for the purpose of Dr. Beyer --  
3                   for the purposes Dr. Beyer was  
4                   seeking?"

5                   (Pause)

6                   "A    I would say he made the right  
7                   decision in not using Ortho's cost  
8                   data, yes."

9                   With respect to what transpired  
10                  yesterday, I noted and these were the two hand-ups. I  
11                  think the plaintiff handed them up. Paragraph 55 of  
12                  Dr. Beyer's reply or rebuttal brief, rebuttal report,  
13                  page 22 and page 23. And I'm referring to page 23,  
14                  the Ortho but for gross profit.

15                  That table, Table 3 includes only  
16                  standard costs. And it identifies but for sales first  
17                  and standard costs and the but for gross profit based  
18                  only on standard cost.

19                  I compared those figures to the figures  
20                  in Exhibit 171 and I guess it was included in  
21                  plaintiff's slides at page 28, we referred to it a  
22                  number of times. But it appears to be Exhibit 171 in  
23                  the original class certification brief filed by  
24                  plaintiff.

25                  If we factor in the cost not included

1 in standard costs, there would be no profit in those  
2 years, and the years are 2003, 4 and 5, and that would  
3 dramatically impact Dr. Beyer's but for figures for  
4 those years. I can't find any comparable data for  
5 2001, 2002.

6 A dramatic issue raised for the first  
7 time clearly, I don't know whether -- I don't recall,  
8 I haven't gone through all the original briefing, but  
9 I don't recall this argued any -- to any great extent  
10 initially. And I didn't go back over my opinion last  
11 night, but I don't think I focused on it in the  
12 opinion.

13 I want this addressed. I'll leave to  
14 you when, and of course, how. If you want to get on  
15 with -- I think it's easy to use RICO instead of  
16 phases, we'll call them buckets, bucket 2, we can do  
17 that, address bucket 3, and at the end of the  
18 proceeding go back to this, so that you can think it  
19 through.

20 It was also raised specifically on Mr.  
21 St. Antoine. He raised the question whether, well,  
22 what happens if buyers' model is deemed unreliable  
23 under Daubert. And we would certainly address it then  
24 because this raises an issue for me, as to the  
25 reliability of Dr. Beyer's model for the year -- well,



1 the first phase, 2000, 2001 through 2005.

2 All right. Preference?

3 MR. CORRIGAN: Your Honor, I'd like to  
4 address it right now directly, and also as part,  
5 ironically, maybe pressuredly, I was going to direct  
6 this at the very beginning of my presentation anyway.

7 THE COURT: Okay.

8 MR. CORRIGAN: But I'd like to address  
9 it right now which I think might be helpful to the  
10 Court.

11 THE COURT: Fine.

12 MR. CORRIGAN: Your Honor, if I might,  
13 I'll hand up some slides. I wouldn't want you to be  
14 without any slides.

15 THE COURT: New slides?

16 MR. CORRIGAN: Yes, new slides. Some  
17 of them are old, but we've filed them for today's  
18 purposes.

19 THE COURT: Have you provided them?

20 MR. CORRIGAN: Sorry, Your Honor.

21 THE COURT: No, that's fine, having a  
22 lot of exhibit books is better than having none. Have  
23 you provided a copy? I'm sure Mr. St. Antoine has  
24 received a copy of it. I note that the new slides are  
25 almost as voluminous as the old slides.

1 MR. ST. ANTOINE: Actually, Your Honor,  
2 I don't think we do have a copy of the slides.

3 THE COURT: You have this? I'm sure  
4 you've got a copy of --

5 MR. CORRIGAN: We'll provide it right  
6 now, Your Honor. Yesterday was difficult to provide  
7 copies because we weren't sure which ones we were  
8 ultimately using and which ones we weren't.

9 A couple of points directly, Your  
10 Honor, on Your Honor's concern, and then I have a  
11 slide I'd like to show, but the main points are these.  
12 Your Honor is correct that that point that was made  
13 yesterday about the costs, was made for the first  
14 time, it was not made in briefs or in expert reports  
15 or anywhere. It's the first time we've heard that.

16 Secondly --

17 THE COURT: But, of course, you had the  
18 letter.

19 MR. CORRIGAN: We had the letter, yes,  
20 and Dr. Beyer addresses that very cost point in  
21 footnote 120 in page 56 of his reply report. The  
22 Bates number, the Ortho CB, that's the FTC document  
23 itself. So Dr. Beyer does address this in his report.

24 THE COURT: Tell me, because I've got  
25 exhibits all over, where is that report?

1 MR. CORRIGAN: It's the --

2 THE COURT: Which --

3 MR. CORRIGAN: It's Exhibit A to our  
4 motion.

5 MR. COE: I'm sorry, Jeff, is that the  
6 reply report?

7 MR. CORRIGAN: I'm sorry. Your  
8 Honor -- I'm sorry, Exhibit A to the reply report.

9 THE COURT: Oh, I have the reply  
10 report. I have it. It's not -- Exhibit A is --

11 MR. CORRIGAN: I thought Exhibit A was  
12 Beyer's reply report. Yeah, page 24, paragraph 56 and  
13 it's footnote 120.

14 THE COURT: Now, Exhibit A, Ortho  
15 Exhibit A -- oh, Ortho's Exhibit A appears to be  
16 Beyer's videotape that was issued. Okay. Where are  
17 you on --

18 MR. CORRIGAN: I'm at footnote 120 at  
19 the bottom. And the sentence that the footnote  
20 follows is, "Furthermore, the financial statement  
21 presented to the FTC shows no material cost increases  
22 between '03 and '08."

23 THE COURT: Now what --

24 MR. CORRIGAN: That's in the middle of  
25 paragraph 56, Your Honor, and then at the bottom,

1 footnote 120.

2 THE COURT: The total costs -- well,  
3 those figures run from 24-A in 2003 which -- no, 36.  
4 4 in 2006 is the high to -- no, 40. Well, that's not  
5 so. The FTC data doesn't corroborate that. The FTC  
6 data, and let me read the figures. I'm looking at  
7 Exhibit 171 to Plaintiff's original class cert brief  
8 and slide 28, Plaintiff's slide, original slide 28,  
9 cost data, 2003, 24,880,000. I won't read the -- or  
10 some odd dollars.

11 2004, 20,965,000; 2005, 21,987,000;  
12 2006, 23,605,000; two thousand -- that's 6. 2007,  
13 20,751,000; 2008, 40 -- I'm sorry, 16,415,000.

14 Well, that's the range of costs. Is  
15 that -- are those the figures you're referring to?

16 MR. CORRIGAN: Yes, Your Honor, yes.

17 THE COURT: When I made the earlier  
18 statement, I moved over a column. This exhibit is  
19 very hard to read. The profit figures have changed  
20 because of 2008, for example is 48,8, whereas in 2003,  
21 it's 24,8.

22 All right. Now, let's go back to page  
23 24 of the Beyer report. "Furthermore, the financial  
24 statements presented to the Federal Trade Commission  
25 show no material cost increases between 2003 and 2008.

1 And now the footnote. I'm reading the footnote.

2 (Pause)

3 MR. CORRIGAN: And, Your Honor, I have  
4 a slide that can help explain the footnote, why the  
5 footnote is correct, and the analysis yesterday is  
6 incorrect.

7 THE COURT: All right. Go ahead.

8 MR. CORRIGAN: Okay. Your Honor, I  
9 preface that this cost data can get jumbled. My  
10 information is that we were not provided CNIS cost  
11 data from Ortho. So that when we see it for the first  
12 time yesterday, this is coming out of the blue. If  
13 this happens earlier, there are things that can be  
14 done to take advantage of that. But when it happens  
15 at the remand hearing for the first time, I -- my  
16 impression, my information from our expert is that we  
17 were not provided CNIS data.

18 THE COURT: Well, you were provided  
19 with the FTC exhibit. It was part of your class  
20 certification.

21 MR. CORRIGAN: The exhibit itself, but  
22 I --

23 THE COURT: Which referred to CNIS.

24 MR. CORRIGAN: It does. But let me  
25 just show you this slide.

1 THE COURT: Well, you just said you  
2 were not provided with. You had the totals, what  
3 you're saying is, you don't have the back-up.

4 MR. CORRIGAN: Yes.

5 THE COURT: Did you ask for it?

6 MR. CORRIGAN: I'm not sure, Your  
7 Honor, to be honest with you, I'm not sure. What we  
8 do normally is we ask for cost data, and then there's  
9 a give and take between the sides, what do you have,  
10 what do we need, that.

11 But Immucor was very simple, they gave  
12 us the cost data, it seemed to be all there. Now,  
13 with Ortho they gave us some cost data, along with a  
14 letter sort of explaining it was unreliable.

15 So it may have got lost in transfer.

16 THE COURT: Well, the letter did and  
17 not something else. It explained the difference  
18 between standard cost data --

19 MR. CORRIGAN: Uh-huh.

20 THE COURT: -- and costs not included  
21 in the standard cost data.

22 MR. CORRIGAN: Uh-huh. Unclear to me,  
23 Your Honor. I'm not saying Ortho did anything wrong,  
24 what I'm saying is that we were provided it, it was  
25 possible that it got lost in the shuffle, that's

1 possible. But I do want to talk about this analysis,  
2 because I think this is at the heart of the Court's  
3 concern.

4 THE COURT: Okay. And you're referring  
5 me to a new slide?

6 MR. CORRIGAN: Yes. That's a new  
7 slide, which is slide number 2 in the presentation for  
8 today. Okay.

9 Now, it's going to take a minute to  
10 walk through.

11 THE COURT: Do it.

12 MR. CORRIGAN: Now, the --

13 THE COURT: This is a slow walk.

14 MR. CORRIGAN: Yes, I'm walking slowly  
15 along with you, Your Honor.

16 THE COURT: Because it's a very -- I  
17 think it's -- well, it's a very significant issue. I  
18 said that once, I'm not going to keep saying it. Go  
19 ahead.

20 MR. CORRIGAN: Okay. So the graph at  
21 the top again is this infamous FTC document, okay, and  
22 we've tried to blow that up as much as we can. It has  
23 the sales, we have the sales blown-up there from 2003,  
24 2004, 2005. Do you see that?

25 THE COURT: Yes.

1 MR. CORRIGAN: Okay. Now, the sales  
2 are important because it gives us some sense on the  
3 data that was used to produce the FTC document. When  
4 we saw this for the first time yesterday, we were  
5 wondering what data, what set of information went into  
6 preparing the FTC document, and how does it comport  
7 with the data that we have, that Dr. Beyer used.

8 We wondered that ourselves. We got  
9 back last night, and we took a look. Okay. So we  
10 have the sales number, 31 million, in '04, it's 34  
11 million and in '05, it's 54 million.

12 And Ortho counsel compared that  
13 document to Table 3 in Dr. Beyer's reply report as the  
14 Court acknowledged. Okay. They compared it to Table  
15 3, and they said that the costs were grossly out of  
16 whack, and the costs went way up, and therefore  
17 Beyer's methodology is all wrong.

18 THE COURT: Costs went way up and  
19 profits --

20 MR. CORRIGAN: Right.

21 THE COURT: -- went way down because of  
22 that.

23 MR. CORRIGAN: So we took a look at Dr.  
24 Beyer's Table 2 in his initial report, and that's on  
25 the bottom of this graph. And what Table 2 gives us



1 is Ortho's sales numbers. It tells us the sum total  
2 of the sales that was included in the data that we  
3 received from Ortho.

4 And if you look at the sales in Table 2  
5 for '03, they're 22,250,000 -- I'm sorry, 22,530,000.  
6 If you compare that to the sales in '03 in the FTC  
7 document, those are 31 million. So if there were that  
8 many more sales, of course, there are going to be many  
9 more costs. This is not an apples-to-apples  
10 comparison.

11 Let's look at 2004. The sales at 2004,  
12 we have 23 million in Beyer's report. Again, that  
13 means that the data we got from Ortho, the  
14 transactional data totaled 23 million in revenue, in  
15 sales.

16 But look at '04 of the FTC document,  
17 it's 34,9. 11 million more dollars, 11 million in  
18 sales, again with 11 million more in sales, you're  
19 going to get more in costs. It's not a comparison,  
20 it's not an apples-to-apples comparison.

21 Look again at '05, our sales and  
22 Beyer's data set 41 million. The data that was used  
23 to put this FTC document together is 54 million. 13  
24 million off. So you're comparing costs associated  
25 with 41 million in sales, and costs in conjunction

1 with 54 million in sales. It's no wonder they're off,  
2 they're not comparing the same data sets.

3 THE COURT: What information, if any,  
4 do you have for the discrepancy in the sales figures?

5 MR. CORRIGAN: Your Honor, we just  
6 don't know what figures went into preparing this FTC  
7 document.

8 THE COURT: Was this not flagged before  
9 today?

10 MR. CORRIGAN: We haven't seen this  
11 argument before today. Dr. Beyer analyzed --

12 THE COURT: But you've seen the  
13 documents. You had them.

14 MR. CORRIGAN: We had Dr. Beyer analyze  
15 them in footnote 120 -- I think it's -- yeah, in  
16 footnote 120.

17 THE COURT: Did he not pick this up? I  
18 guess he didn't.

19 MR. CORRIGAN: Well, he saw the  
20 document, he analyzed the cost. I mean, he says  
21 there, based on his analysis of cost, Ortho's cost in  
22 that document increased by 6.4 percent. So he did  
23 analyze that document. But what Ortho counsel did  
24 yesterday as not analyze that document, they analyzed  
25 in comparison with Dr. Beyer's table, and that's where

1 we have a problem.

2 Dr. Beyer analyzed the FTC document in  
3 that footnote, and he says that Ortho's costs over  
4 that four year period increased 6.4 percent. So he  
5 did analyze it. But the problem is, when you analyze  
6 it in comparison with his other table, that's where we  
7 have a major disconnect. It's not apples to oranges,  
8 it's apples to door knobs, they're not close, and that  
9 explains the significant discrepancy in the costs.

10 THE COURT: Apples to door knobs.

11 MR. CORRIGAN: Keep that in mind, Your  
12 Honor. If you want to use it in your opinion, you're  
13 welcome to.

14 THE COURT: I might decline that.

15 MR. CORRIGAN: I have a funny feeling  
16 you might, yes. So that should --

17 THE COURT: Well, what do you think we  
18 should do about that?

19 MR. CORRIGAN: I think that Dr. Beyer's  
20 analysis is legit, 120. Ortho's costs went up 6.4  
21 percent over four years, that's not a significant  
22 number, that's not going to throw anything off.  
23 That's not going to tell Your Honor that Dr. Beyer  
24 doesn't have good grounds for his opinions. I mean,  
25 we knew costs were going up slightly, and he says it

1 right in this report.

2 The problem comes when you compare  
3 apples to door knobs, you've got a major discrepancy  
4 and obviously the Court was concerned about. And  
5 we're --

6 THE COURT: Was this discrepancy in the  
7 sales figures covered in any of the depositions or any  
8 of the discovery, other than depositions?

9 MR. CORRIGAN: Well, we don't see it as  
10 a discrepancy in the sales figures, it's just we've  
11 got a data set, they used a different data set.

12 THE COURT: Well, there's a  
13 discrepancy. Two different figures reported as sales  
14 for a given year, that's a discrepancy.

15 MR. CORRIGAN: Your Honor, you're  
16 correct. We didn't see the importance of it. Dr.  
17 Beyer got the data set from Ortho, I mean, we went  
18 back and forth, he got his data, he worked with the  
19 data.

20 You know, the FTC, they have different  
21 concerns with the FTC, they used different data, he  
22 analyzed the document, but he didn't say -- he didn't  
23 think it was necessary to perform the analysis to get  
24 the extra data that they may have used from the FTC.  
25 But he did analyze the document and show it again,

1 modest 6.4 percent over a four year period.

2 My guess is if the Court had seen a  
3 modest 6.4 increase over the four year period, you  
4 wouldn't have been concerned, as you were by viewing  
5 this document, which has now been shown at the --

6 THE COURT: Well, the comparison of the  
7 two documents, the FTC document with Dr. Beyers' chart  
8 at page I guess it's 23, wiped out the profits, it  
9 would've been either minimal profits or losses.

10 MR. CORRIGAN: And now we see why that  
11 it is, and it's not just right, it's not so.

12 THE COURT: Because the sale figures  
13 are not the same as the sales figures on which he  
14 relied in Table 3.

15 MR. CORRIGAN: Which means -- so when  
16 the sales figures are off, that means everything's  
17 off. The costs measured with those sales figures are  
18 also off. So you really can't tell anything from that  
19 comparison, Your Honor.

20 Whatever can be told from that document  
21 is told in footnote 120 right there. Dr. Beyer had  
22 good grounds for his opinion and he still does,  
23 despite that discrepancy.

24 THE COURT: And the good grounds are  
25 based on his analysis of the figures submitted to the

1     FTC in your Slide 28, your Exhibit 171 in the original  
2     class certification --

3                     MR. CORRIGAN:  Yes, Your Honor.

4                     THE COURT:  -- briefing.

5                     Have you calculated or tried to  
6     calculate the effect of a 6.4 percent increase in  
7     costs over the years?  I guess the years he's  
8     referring to there, not the whole spread --

9                     MR. CORRIGAN:  It's '03 to '07, so it  
10    does conclude sort of periods, pieces of both periods  
11    of the benchmark.

12                    THE COURT:  Yes.

13                    MR. CORRIGAN:  I can't point you right  
14    now, Your Honor, the place where it was done, but  
15    obviously Dr. Beyer was aware.  He factored in costs  
16    adequately in all of his benchmarks, and all of his  
17    benchmarks reflected market structure as Your Honor  
18    has found.

19                    THE COURT:  Who -- all right.  And  
20    that's an explanation, which is what I was seeking.

21                    Who took Dr. Bronstein's deposition?  
22    Did you take it?

23                    MR. CORRIGAN:  I did.

24                    THE COURT:  When he gave those answers,  
25    what -- I haven't reread the whole deposition, I read

1 parts of it. What was your thinking, what was your  
2 conclusion?

3 MR. CORRIGAN: On the -- the part the  
4 Court just read about the unreliability of Ortho's  
5 data?

6 THE COURT: Yes.

7 MR. CORRIGAN: It tells me that Dr.  
8 Beyer has good grounds for what he's done. When their  
9 own expert is saying he agrees that Dr. Beyer  
10 shouldn't have used Ortho's costs, good grounds, I  
11 mean, that's right on Daubert, they don't even have a  
12 conflicting opinion on that. Their own expert says he  
13 did that, after a pause as you saw. He may have been  
14 trying to think of another answer. I didn't put that  
15 pause in, Your Honor, the court reporter did that,  
16 although I'm glad it's there. He thought long and  
17 hard about it, and he said, you know, Dr. Beyer was  
18 right in not using Ortho's costs. It's Daubert in a  
19 nutshell, good grounds.

20 THE COURT: Well, you've provided an  
21 answer to the --

22 MR. CORRIGAN: I hope it was the right  
23 answer, Your Honor. You didn't say that.

24 THE COURT: Well, it was. It was an  
25 answer. Mr. St. Antoine, or Mr. Coe, who is going to

1 respond?

2 MR. ST. ANTOINE: Your Honor, could we  
3 have one moment to confer?

4 THE COURT: And because we're jumping  
5 around, although I don't ordinarily allow a two on  
6 one, Corrigan is doing such a good job of explaining,  
7 because you've divided this aspect of the argument,  
8 I'll permit both of you to speak.

9 MR. ST. ANTOINE: It could very well be  
10 one, but that's -- let me -- if I may have just a  
11 moment?

12 THE COURT: Fine, absolutely.

13 (Pause)

14 THE COURT: All right, Mr. Coe.

15 MR. COE: Good morning, Your Honor.  
16 Before I start, there's one document that we showed on  
17 the screen yesterday in connection with this  
18 conversation that I'd like to provide to the Court,  
19 and that was the blow-up we did of the 2004 and 2005  
20 FTC data.

21 And then someone on the fly yesterday,  
22 we were drawing this comparison between Dr. Beyers'  
23 numbers and the FTC data, so we've also created a new  
24 slide that just shows those numbers on the same  
25 document.



1                   So the first point I wanted to address,  
2   Your Honor, is this point about whether this was the  
3   first time we made this argument, and it was not.  
4   This was in our reply brief at page 18. We said that  
5   Ortho decided to increase price in 2005 after it  
6   learned in 2004 that its actual costs, costs not in  
7   standard or CNIS were significantly higher than the  
8   costs as predicted in 2003, and we cited I believe to  
9   --

10                   THE COURT: This is the reply brief?

11                   MR. COE: Correct, Your Honor, on  
12   remand.

13                   MR. CORRIGAN: On remand.

14                   THE COURT: Fine.

15                   MR. CORRIGAN: Which was just submitted  
16   two weeks ago.

17                   THE COURT: It was submitted July 10th.

18                   MR. CORRIGAN: Yes.

19                   MR. COE: Correct, Your Honor.

20                   And then we go on to say the cost data  
21   --

22                   THE COURT: Well, that's just three  
23   years since my class certification opinion and maybe  
24   three and a half -- well, not quite because the  
25   briefing was rather -- was done in a timely fashion,

1 I'm talking about the original brief.

2 MR. COE: Right.

3 THE COURT: But we're still talking  
4 three plus years.

5 MR. COE: Correct, Your Honor.

6 THE COURT: To raise an issue.

7 MR. COE: Correct, Your Honor. On that  
8 point --

9 THE COURT: But did you flag the issue?

10 MR. COE: Well, if you remember, Your  
11 Honor, we played excerpts from Mr. Kashen Schmidt's  
12 (ph) deposition yesterday, where he talked about this  
13 issue, of the reason for the 2005 price increases  
14 being at these costs not in standard, show that raw  
15 material costs were much higher than expected.

16 THE COURT: When was that deposition  
17 taken? In 2012?

18 MR. COE: 2012, April 3rd, 2012, Your  
19 Honor. And as Mr. Corrigan said, they never asked for  
20 this actual cost data.

21 THE COURT: Well, they asked for cost  
22 data.

23 MR. COE: Your Honor, what happened  
24 was, Dr. Beyer was told the standard cost data they  
25 asked for was not reliable, but he didn't do anything

1 to follow-up on that, he took that as an excuse to  
2 say, I'm going to make some unscientific assumptions  
3 about costs, and we're going to use Immucor costs with  
4 Ortho's costs, he didn't dig in deeper as he should  
5 have. As a scientist, he didn't ask for this actual  
6 cost data or do any analysis based on this actual cost  
7 data, Your Honor.

8 THE COURT: I'll pass that for the  
9 minute, but how do you explain, I'm sorry to get you  
10 off track, Dr. Bronstein's testimony?

11 MR. COE: He was talking about standard  
12 costs, Your Honor, the standard cost data that Ortho  
13 has said was unreliable.

14 THE COURT: No, that's not the  
15 question. What was the basis of Dr. Beyer's  
16 conclusion that he wasn't going to rely on Ortho's  
17 cost data? Cost data includes everything presented on  
18 cost. And his answer, and I'm skipping,

19 "I would say that he made the  
20 right decision in not using Ortho's  
21 cost data, yes."

22 MR. COE: Again, Your Honor, he goes on  
23 to say,

24 "There was information provided  
25 from Ortho that they recharacterized

1 cost from time to time."

2 THE COURT: Yes.

3 MR. COE: "And as a result the cost --"  
4 it says dated, but I'm sure it's supposed to be data,  
5 "that you requested wouldn't be comparable from year  
6 to year."

7 And that goes directly back to the  
8 letter that we handed up to Your Honor as Exhibit 172  
9 where Ortho said that it's standard cost data --

10 THE COURT: Yes, but your expert has  
11 said, Beyer was correct in not considering costs.

12 MR. COE: He was correct in not using  
13 the standard cost data, Your Honor. I don't read that  
14 to say that Dr. Beyer was correct in not using any of  
15 Ortho's cost data. This data that we've been relying  
16 on, this FTC submission, was submitted to the federal  
17 government, Your Honor. I don't think anyone's --

18 THE COURT: But there's no reference in  
19 Bronstein's testimony here, and you can point to other  
20 testimony, I'm referring to page 245 to the phrase,  
21 standard cost data, the reference is to cost data.  
22 And you've said, they had -- they requested cost data  
23 and we gave them what we had. I don't know what that  
24 was, but Bronstein didn't limit his answer to standard  
25 cost data. He agreed with Beyer on this issue.

1 MR. COE: Well, he was responding to a  
2 question, Your Honor --

3 THE COURT: That's normally what  
4 happens at depositions.

5 MR. COE: Right, exactly. It wasn't,  
6 you know, an exact artful answer, but --

7 THE COURT: I should tell you that your  
8 team is smiling now, they're glad that you're up here  
9 being peppered with questions. St. Antoine doesn't  
10 smile very much during oral argument, but he's smiling  
11 now, and you're doing very well, Mr. Coe, but you  
12 still have to explain this.

13 MR. COE: As Your Honor knows very  
14 well, you know, when you're asked a question at a  
15 deposition, you're not thinking about all the  
16 permeations of the words you're using, I mean, I think  
17 it ties in very well to the letter that we sent that  
18 addresses standard cost data. I don't believe actual  
19 costs, he was ever asked the question about actual  
20 cost data at his deposition, Your Honor.

21 THE COURT: Well, he wasn't asked a  
22 specific question of which I've been pointed to on  
23 actual cost data versus standard cost data. He's just  
24 asked a question about cost data. This is a big  
25 hurdle for the defense. And I -- but I still can't

1 understand why this issue wasn't flagged much, much  
2 earlier. It seems to me to be a significant issue,  
3 and what you've said, well, we did flag it earlier, we  
4 flagged it 12 days ago on an issue that was raised  
5 over three years ago.

6 Well, I don't want to beat a dead  
7 horse.

8 MR. COE: We have had three years to  
9 think about it, Your Honor, and I think some new  
10 things did come up in those three years.

11 But -- you know, I think the more -- I  
12 want to address a couple of the other points Mr.  
13 Corrigan made if that's okay. You know, the main  
14 point he made was relying on this data or the  
15 statement that Dr. Beyer made talking about price  
16 increases from 2003 to 2008. And that's not a  
17 relevant time period to the two points that we were  
18 trying to make yesterday.

19 If we could show our, I believe it's  
20 slide 31.

21 THE COURT: Original slide 31?

22 MR. COE: I'm sorry, 34. We only have  
23 one slide deck, Your Honor, so.

24 THE COURT: Yes, I have --

25 MR. COE: So that the first point that

1 we made was that Ortho's gross profit margin did not  
2 surpass this 40 percent goal in 2004.

3 THE COURT: We're looking at different  
4 -- oh, it's not the slide on the screen. Slide --

5 MR. COE: 34, Your Honor. 3-4, I might  
6 have misspoke when I gave you --

7 THE COURT: I thought you said 31.

8 MR. COE: I did say 31, Your Honor.

9 THE COURT: 31, all right, yes, I have  
10 that.

11 MR. COE: As we explained why we  
12 thought 2004 was a relevant year, both in our brief  
13 and yesterday, but then we also do the comparison of  
14 2005, and that's the document that I just handed up to  
15 Your Honor.

16 So the numbers Mr. Corrigan showed  
17 about these revenues being different and these costs  
18 might have been different -- well, actually he talked  
19 about revenue, Your Honor, he didn't say anything  
20 about what Ortho's actual costs were in 2005 or 2004,  
21 all we know is that Dr. Beyer didn't account for them,  
22 and that renders his analysis of what their gross  
23 profit margin --

24 THE COURT: Yes, but Dr. Beyer does  
25 account for them in footnote 120, looking at the

1 corrected sales figures, the -- based on the FTC  
2 submission. He says, "costs increased by a modest 6.4  
3 percent over --" he uses a four year period, and --

4 MR. COE: And he's looking at that cost  
5 data in a different context, Your Honor. So in this  
6 paragraph of his reply report, he's talking about his  
7 use of Immucor's standard costs as a proxy for Ortho's  
8 standard costs in this post 2006 time period.

9 THE COURT: The footnote refers only to  
10 Ortho's costs.

11 MR. COE: Correct. If you read --

12 THE COURT: And what he says is, if  
13 using the correct figures, what you're arguing now,  
14 are the correct figures, the figures submitted to the  
15 FTC, the costs over this period and I keep referring  
16 to quote this period because we're talking about --  
17 let me get the FTC report.

18 The FTC report covers 2003 through  
19 2008, and I think that's what Beyer is --

20 MR. COE: That's the time period he's  
21 using, Your Honor.

22 THE COURT: Yes.

23 MR. COE: Maybe I should put this --  
24 let's back up a little bit.

25 THE COURT: Well, what he's saying is,



1 that the costs and I'd like you to answer this, the  
2 costs of this period, total costs increased by a  
3 modest 6.4 percent. Then he says over the four year  
4 period. But the bottom line --

5 MR. COE: Well --

6 THE COURT: -- Corrigan argues that 6.4  
7 percent increase in costs over that period is not  
8 sufficient to throw out Beyer's model for that period.

9 MR. COE: So he doesn't have a model  
10 for the 2003 to 2008 period, Your Honor, he has a  
11 model --

12 THE COURT: Well, he has a model for  
13 the entire --

14 MR. COE: -- for 2001 to 2005, and then  
15 he has a second set of models for 2006 to 2010.

16 THE COURT: Well, but this argument  
17 would apply to both.

18 MR. COE: It wouldn't, Your Honor, and  
19 that's -- I've switched to slide 35, which is the  
20 second point we were making with this FTC data  
21 yesterday, and that's that costs did increase from the  
22 time of the BBLP plan through 2005. So this first  
23 half of the class period costs increased, and Dr.  
24 Beyer should have accounted for costs in his benchmark  
25 the benchmark used for the first half of the class

1 period.

2 And the FTC data doesn't have any  
3 actual cost data for 2000, 2001 or 2002, so you can't  
4 use this FTC cost data to determine what happened  
5 between 2001 and 2005.

6 THE COURT: For what reason was cost  
7 data not submitted by Ortho to the FTC for those  
8 earlier years?

9 MR. COE: I don't know, Your Honor, we  
10 can get back to you on that. I would imagine they  
11 didn't ask for it, but I'm not sure.

12 THE COURT: That was what occurred to  
13 me.

14 MR. COE: So if you see on this slide,  
15 Ortho is predicting back in 2000 --

16 THE COURT: And now you're referring to  
17 slide 35.

18 MR. COE: Right. That it's standard  
19 costs or its costs were going to be \$10.2 million.  
20 It's actual costs by 2003 were 24.88 million, Your  
21 Honor. So the question is, did costs increase from  
22 2000 to 2005 and we would argue the evidence is that  
23 they did, Your Honor, and that Dr. Beyer's comment in  
24 paragraph 56 doesn't address that, because he only  
25 talks about 2003 to 2008.

1 THE COURT: What are the cost figures,  
2 the comparable cost figures for 2000, 2001 and 2002,  
3 and where are those figures found?

4 MR. COE: I don't believe we have them,  
5 Your Honor. What we have is this prediction that  
6 Ortho made in 2000 in connection with the Blood Bank  
7 Leadership Program.

8 THE COURT: And that's the quote  
9 prediction, end of quote on the bottom part of the  
10 slide identified on page 35?

11 MR. COE: That's correct, Your Honor.

12 THE COURT: And again, let's go over  
13 those, the costs.

14 MR. COE: Sure. So -- if I may  
15 approach, Your Honor?

16 THE COURT: Yes.

17 MR. COE: I've got a demonstrative. So  
18 this would've been September 15th document,  
19 Plaintiff's Exhibit 54 that we've shown one page of on  
20 slide 35. It's at the bottom half of the screen, and  
21 the first column is base case 2001 --

22 THE COURT: They are actual.

23 MR. COE: -- year one.

24 THE COURT: That's actual.

25 MR. COE: That's actually a prediction,

1 Your Honor, because this is 2000. They're predicting  
2 what they thought their sales and costs and profit  
3 would be in 2001.

4 THE COURT: And they predict in 2001  
5 total costs of 11,784? No.

6 MR. COE: Correct, Your Honor, although  
7 I will say --

8 THE COURT: Yes.

9 MR. COE: -- just to confuse us a  
10 little more, this is the prediction without the price  
11 increase. This is if they had not implemented the  
12 Blood Bank Leadership Program.

13 The next column, year one --

14 THE COURT: Do costs increase with a  
15 price increase?

16 MR. COE: They might go down, Your  
17 Honor, and that's why -- adding on another layer, but  
18 if you increase prices, and you lose sales to Immucor  
19 --

20 THE COURT: Oh, the second half of that  
21 equation is you lose sales.

22 MR. COE: Correct, Your Honor. Or --  
23 but you don't lose revenues, because your prices are  
24 so much higher. So your revenue actually goes up, but  
25 the number of units you're selling goes down.

1 THE COURT: Could go down.

2 MR. COE: Correct, Your Honor.

3 THE COURT: If --

4 MR. COE: Especially if Immucor doesn't  
5 follow in the price increase. If you remember --

6 THE COURT: Well, that's if demand is  
7 elastic.

8 MR. COE: Correct, Your Honor. We have  
9 to go back to Mr. St. Antoine's demand curves, Your  
10 Honor. So I think Dr. Beyer recognizes in the  
11 footnote that we've been talking about that as --

12 THE COURT: Let him finish.

13 MR. COE: -- prices go up, sales go up,  
14 it's possible that units go down, and therefore the,  
15 you know, the price per unit might not be changing or  
16 may be going up or going down, and that might not  
17 necessarily be reflected in this total cost.

18 THE COURT: And so relate your argument  
19 to --

20 MR. COE: Sure.

21 THE COURT: -- these figures. What  
22 you're saying is, the prediction in 2000 for costs, I  
23 guess the only comparable year would be -- I'm turning  
24 --

25 MR. COE: Year three, Your Honor. This

1 --

2 THE COURT: 2003 would be --

3 MR. COE: Correct.

4 THE COURT: -- the actual costs in  
5 2003, according to the FTC document.

6 MR. COE: The 24 million --

7 THE COURT: 24,8.

8 MR. COE: Right. And Ortho had  
9 predicted this 10.2 million dollar number at the  
10 bottom right-hand corner of Plaintiff's 54, Your  
11 Honor.

12 THE COURT: All right. What were the  
13 actual costs for the years -- I think I asked this  
14 question and I don't think I --

15 MR. COE: I don't know off the top of  
16 my head, Your Honor. We can go back to the record and  
17 see.

18 THE COURT: Isn't that important?  
19 Because if the actual costs in those years were in  
20 line with the costs that Dr. Beyer analyzed in his  
21 footnote 120, wouldn't the result be the same, a  
22 modest?

23 MR. COE: It is important, Your Honor,  
24 and Dr. Beyer should have taken actual costs into  
25 account in his methodology.

1 THE COURT: But this is -- now you're  
2 in Daubert mode.

3 MR. COE: Yes, Your Honor.

4 THE COURT: And what you're telling me  
5 is you don't have the data.

6 MR. COE: Well, Your Honor, Daubert  
7 mode is not our burden to have this data, it's Dr.  
8 Beyer's burden.

9 THE COURT: It's a Daubert challenge.

10 MR. COE: Correct, Your Honor.

11 THE COURT: So what you're saying is,  
12 Dr. Beyer's statement in footnote 120 is not -- does  
13 not cover everything that he needs to cover. And then  
14 I asked you, well, what figures does he need to cover,  
15 what are you relying on to argue that the 6.4 percent  
16 cost increase over this period and this period appears  
17 to be 2003 to -- through 2007, doesn't state the full  
18 picture? You can argue that, but what are the -- what  
19 cost data do you have that should tell me, according  
20 to your argument, that Beyer was wrong, that the cost  
21 fluctuation was more substantial? Is it what you've  
22 just argued from slide 35 or do you have more?

23 MR. COE: I believe we have more, Your  
24 Honor, but I'll have to go back into the record, so we  
25 might need to supplement the record maybe after the

1 hearing on that, Your Honor. I don't have that in  
2 front of me today.

3 THE COURT: Fine. Should we let him  
4 finish, Mr. Corrigan?

5 MR. CORRIGAN: I had one point that I  
6 thought was -- and I don't mean to interrupt, but the  
7 point I would make on this graph while Mr. Coe is up  
8 there, I don't believe they're using CNIS in the  
9 bottom, I don't think that's the case. I mean,  
10 they're talking about standard costs, the infamous  
11 unreliable standard costs in the bottom, and the top  
12 graph is talking about CNIS.

13 So again, we have apples to doorknobs.

14 THE COURT: Well, what are COGS?

15 MR. CORRIGAN: That's the costs of  
16 goods sold, don't know whether that includes CNIS or  
17 not.

18 THE COURT: A good point. Mr. Coe, can  
19 you answer that?

20 MR. COE: I believe that's standard  
21 costs, and we made this point yesterday, Your Honor,  
22 but the standard cost prediction had also gone up by  
23 2003, so that was at 14.1 million by 2002 when they  
24 made this 2003 prediction, which was about \$4 million  
25 higher than what they predicted two years earlier in



1 2000.

2 THE COURT: Isn't that the more --  
3 well, if I were picking costs, wouldn't that be the  
4 argument that you would want me to focus on?

5 MR. COE: No, Your Honor. Our argument  
6 is that Dr. Beyer should have taken actual costs into  
7 account, it wasn't appropriate for him to --

8 THE COURT: But the figures that you're  
9 referring to, costs of goods sold, doesn't tell me  
10 whether that's actual costs or standard costs.

11 MR. COE: That's correct, Your Honor.

12 Your Honor, again I go back to the  
13 point that I've already made that there is a big  
14 difference between standard costs and actual costs.

15 THE COURT: I'm getting that  
16 impression.

17 MR. COE: And something that Dr. Beyer  
18 should have taken into account, and his failure to do  
19 that renders his --

20 THE COURT: But you're all over the  
21 place in the figures that you're arguing.

22 MR. COE: As is Dr. Beyer, Your Honor.  
23 As we talked about yesterday, in some places he uses  
24 standard costs, some places he uses -- sometimes he  
25 uses Immucor's standard costs --

1 THE COURT: Well, he uses actual --

2 MR. COE: -- or Ortho's, sometimes he  
3 uses Ortho's standard cost, in this footnote we just  
4 read, he's looking at Ortho's actual costs.

5 THE COURT: Well, he's explaining why  
6 he need not use or refer to Ortho's actual costs.

7 MR. COE: And let me address that, Your  
8 Honor.

9 THE COURT: And that's issue we're  
10 talking about.

11 MR. COE: Right.

12 THE COURT: Because Corrigan says, he  
13 didn't use costs, standard costs or actual costs, and  
14 it's not significant. If we're talking about standard  
15 costs, they did not increase dramatically. If we're  
16 talking about actual costs, referring to footnote 120,  
17 he didn't use them because Ortho's costs, actual  
18 costs, I'm adding the word actual, increased by a  
19 modest 6.4 percent over the four year period.

20 MR. COE: And, Your Honor, if I can go  
21 back to this paragraph of Dr. Beyer's report. I'd  
22 like to start with the third sentence, it starts after  
23 footnote 118, paragraph 56.

24 It starts with Dr. Bronstein also  
25 criticizes me.

1 THE COURT: Your page 23?

2 MR. COE: 24, Your Honor.

3 THE COURT: Oh, yes. Yes, yes, I have  
4 it.

5 MR. COE: So I think this will put this  
6 footnote in context. It says, "Dr. Bronstein also  
7 criticizes me for using changes in Immucor's costs as  
8 a proxy for the change in Ortho's costs. There is,  
9 however, no evidence to support Dr. Bronstein's  
10 speculation that Ortho's costs may have been rising  
11 faster than Immucor's costs. In fact, the standard of  
12 cost data produced by Ortho actually shows costs  
13 falling, which would result in lower but for prices  
14 than would result from relying on Immucor's costs.

15 "Furthermore, the financial statement  
16 presented to the Federal Trade Commission shows no  
17 material cost increases between 2003 and 2008."

18 So the reason he's citing this FTC data  
19 is to buttress his use of Immucor's costs as a proxy  
20 for Ortho's costs in the second half of the class  
21 period.

22 Now, as we'll get to later eventually,  
23 one of our primary arguments or criticisms of Dr.  
24 Beyer's use of Immucor's standard costs in the second  
25 half of the class period is that they are flat. We

1 admit that the costs in the second half of the class  
2 period don't go up.

3           If you go back to paragraph 55, which  
4 is on pages 22 and 23, and this is where Dr. Beyer  
5 goes through his calculations of Ortho's but for  
6 profit margins, he says in the second to last sentence  
7 at the -- on page 22 in paragraph 55, he says, "I  
8 performed similar calculations in Table 3 subtracting  
9 Ortho's standard costs from its but for sales to  
10 arrive at Ortho's margins in the but for world."

11           So for purposes of doing these gross  
12 profit calculations that we talked about, he used  
13 Ortho's standard costs and did not take these actual  
14 costs --

15           THE COURT: Well, that's obvious from  
16 the table, that's what we're talking about. Table 3  
17 refers to just standard costs.

18           MR. COE: So I think what this shows  
19 us, Your Honor, is that Dr. Beyer knew that actual  
20 costs were different than standard costs. He decided  
21 to take them into account or address them in one  
22 context, but he ignored them in this other context,  
23 where he was supposedly justifying his decision to cut  
24 off these price increases after five years, Your  
25 Honor.

1 THE COURT: Do that again.

2 MR. COE: Sure. So when he's  
3 justifying the use of his benchmark in the second half  
4 of the class period, this Immucor cost benchmark --

5 THE COURT: Well, that's because  
6 Immucor did not differentiate between standard costs  
7 and actual costs.

8 MR. COE: I don't know if that's the  
9 case, Your Honor.

10 THE COURT: There's no evidence,  
11 there's been no argument that they did.

12 MR. COE: I don't know one way or the  
13 other, Your Honor.

14 THE COURT: Corrigan said they did not.

15 MR. COE: I'm not sure that's what he  
16 said, but --

17 THE COURT: Did you, Mr. Corrigan?

18 MR. CORRIGAN: There's been no  
19 challenge to the Immucor costs.

20 THE COURT: That's not what I asked. I  
21 asked, does Immucor differentiate between actual costs  
22 and standard costs?

23 MR. CORRIGAN: I'd have to check with  
24 my expert, Your Honor, but the key point is that  
25 there's been no challenge to Immucor's costs. They

1     were fine, they were even by transaction, they were  
2     very easy to work with. Ortho's costs were exactly  
3     the opposite.

4                     THE COURT: All right. Thank you. Not  
5     quite an answer, but thank you.

6                     MR. COE: So he books that Immucor, or  
7     I'm sorry, Ortho's actual costs in that context to  
8     justify the use of Immucor's costs as a proxy for  
9     Ortho's costs.

10                    THE COURT: Show me that statement  
11    again. I missed it.

12                    MR. COE: Sure. This is in paragraph  
13    56, Your Honor. And he's responding to Dr.  
14    Bronstein's criticism about using Immucor's costs as a  
15    proxy for the change in Ortho's cost. And just to  
16    summarize he says, well, Ortho's costs were actually  
17    going down or going up by less than Immucor's costs.  
18    So this is actually --

19                    THE COURT: But there's nothing in that  
20    paragraph that says anything about actual costs versus  
21    standard costs.

22                    MR. COE: Well, it's in the footnote,  
23    Your Honor. So he says, the financial statements --  
24    first, he looks at Ortho's standard costs --

25                    THE COURT: Well, he looks at -- okay.

1 Where does it say that?

2 MR. COE: Sure. If you start with  
3 footnote 119, Your Honor, skip the next sentence, and  
4 start with the sentence that starts, "in fact."

5 THE COURT: I'm reading footnote 119.

6 MR. COE: Oh, I'm sorry, Your Honor,  
7 I'm --

8 THE COURT: In the bottom.

9 MR. COE: I was giving that as a place  
10 holder.

11 THE COURT: All right. In fact, I have  
12 it.

13 MR. COE: "In fact, the standard of  
14 cost data produced by Ortho actually shows costs  
15 falling, which would result in lower but for prices  
16 than would result from relying on Immucor's costs."

17 THE COURT: Then he drops to footnote  
18 120, where he says, Ortho -- he refers to Ortho's  
19 total costs, and then says, they increase by a modest  
20 6.4 percent.

21 MR. COE: Exactly, Your Honor. So he's  
22 saying, I looked at the standard cost data, it's going  
23 up by less than Immucor's standard costs of what the  
24 actual cost data is going up by less than Immucor's  
25 standard of costs, so I should be able to use

1 Immucor's standard of costs as a proxy for Ortho.

2 THE COURT: For the second period. For  
3 the second period.

4 MR. COE: Correct, Your Honor, for the  
5 second period.

6 THE COURT: But you're using the same  
7 data for a different argument now.

8 MR. COE: Correct, Your Honor. I'm  
9 talking about Dr. Beyer's decision -- two points, they  
10 both relate to Dr. Beyer's decision to ignore actual  
11 cost data in the first half of the class period. And  
12 we argue that that led him to make two errors. The  
13 first was, he ignored costs in his benchmark for the  
14 first half of the class period.

15 And one of his justifications for that  
16 was, costs weren't going up that much, or they weren't  
17 going up at all, and we've tried to show here that --

18 THE COURT: What you -- you haven't  
19 shown the actual cost figures for those earlier years.

20 MR. COE: Correct, Your Honor. Second  
21 point we're --

22 THE COURT: But that's a big correct.  
23 Isn't that --

24 MR. COE: I don't think it is, Your  
25 Honor, I think, you know, I think we'll be able to



1 show that costs did, in fact, go up during this time  
2 period, but you're right, we'll have to supplement the  
3 record on that point.

4 THE COURT: All right.

5 MR. COE: The second point is, Dr.  
6 Beyer came up with this calculation of gross profit  
7 margin to justify his decision to cut off the 25  
8 percent price increases after five years. And he said  
9 that Ortho would've far surpassed this 40 percent  
10 profit margin in 2005, so there was no need to  
11 continue these price increases.

12 THE COURT: And your answer is taking  
13 into consideration actual costs --

14 MR. COE: That's not the case, correct,  
15 Your Honor.

16 THE COURT: -- the cost -- the costs  
17 not included in standard costs.

18 MR. COE: If you took into account the  
19 actual costs, actually we're still losing money in Dr.  
20 Beyer's but for world in 2005.

21 THE COURT: Thank you.

22 MR. CORRIGAN: Your Honor, may I be  
23 heard? I have one or two brief points.

24 THE COURT: Yes. You'll address that  
25 last point. We've sort of beaten the first point to

1 death, but the last point.

2 MR. CORRIGAN: I will. The points are  
3 brief, and then I'll move on with the rest of what we  
4 have.

5 A minor point, Dr. Bronstein's  
6 testimony that the Court has cited several times, he  
7 was being cross-examined, but it wasn't at the  
8 deposition. It was live testimony in front of this  
9 Court.

10 So if you ever want to carefully think  
11 about an answer, that's a good time to do it.

12 Secondly, the way that costs and  
13 transactional data works is beginning in the case,  
14 beginning this effort, we say we want your  
15 transactional data, your cost data. They give us  
16 something, we go through it, we take a look what's  
17 wrong and ask them questions. Immucor did that, and  
18 we went on our way. The data made sense.

19 Ortho then sends this letter, which I  
20 have not seen before. I've not -- no, I've seen the  
21 letter, I'm sorry. I have not seen a company of that  
22 size and sophistication come into a case and say oh,  
23 by the way, our standard costs are unreliable. I have  
24 not seen that.

25 But what we did think was, well,

1 they've announced their costs were unreliable, we can  
2 use Immucor costs. What I have to admit, I didn't  
3 foresee, is they say their costs are unreliable, and  
4 now they're spending all this time and effort on what  
5 issue, costs. You said your issue was costs were  
6 unreliable. We thought that might have been a dead  
7 issue, but that's the most live issue in their  
8 argument now. How is that a live issue?

9 Now, the Story Parchment quote I  
10 mentioned yesterday --

11 THE COURT: I'm trying to predict what  
12 the Court of Appeals is going to say --

13 MR. CORRIGAN: I'll bet.

14 THE COURT: -- on this issue.

15 MR. CORRIGAN: Story Parchment says  
16 "the wrongdoer should not get the benefit of any  
17 imprecise damages because --"

18 THE COURT: I'm aware of that.

19 MR. CORRIGAN: "-- of its wrong --"

20 THE COURT: I'm aware of that. I'm  
21 aware of that law.

22 MR. CORRIGAN: This is the same  
23 situation. Ortho's trying to get the benefit of their  
24 own unreliable costs. That shouldn't be allowed to  
25 happen, and that's last point on this, unless the

1 Court has questions, I'll move on with the rest of my  
2 presentation.

3 THE COURT: Well, the last point that  
4 Coe made is that, taking profits, focused on profits,  
5 and use of the CNIS, there were no profits in many of  
6 the years that we're addressing. Can you -- in any of  
7 the years.

8 MR. CORRIGAN: Under the -- under Dr.  
9 Beyer's benchmark?

10 THE COURT: Yes. That in the but for  
11 world if we --

12 MR. CORRIGAN: Okay. The --

13 THE COURT: -- use actual costs, there  
14 were no profits.

15 MR. CORRIGAN: Well, we saw the tables  
16 that Dr. Beyer used. The profit margin for both Ortho  
17 and Immucor was going up. I mean, Ortho started in  
18 the negative, it went into a smaller negative, and it  
19 went up and up and up. So there were profits being  
20 shown in Dr. Beyer's tables. The profit margin in  
21 Immucor and Ortho's tables were not significant.

22 THE COURT: We'll have to look again at  
23 that, thank you. All right. Now, let's move to the  
24 second category of arguments.

25 MR. CORRIGAN: Your Honor, as you know,

1 we've sort of broken this up, and I'm going to be  
2 handling the Court's issues on 5, 6 and 7, but I did  
3 want to make one point from yesterday too, that Mr.  
4 St. Antoine had said, I used the figure of 2,000  
5 percent price increase, and he said where I got that  
6 from.

7 And actually where I got it from was  
8 this Court's opinion, and I quote, "However,  
9 defendant's creation of a duopoly --" this is page  
10 236, "However, defendant's creation of a duopoly by  
11 the acquisition of a number of competitors shortly  
12 before the alleged conspiracy began, does not mitigate  
13 the fact that prices on many TBR products rose by more  
14 than 2,000 percent during the class period, that those  
15 huge increases occurred very shortly after the alleged  
16 collusion began, and that those huge increases applied  
17 to all customers."

18 So that's where I got the 2,000  
19 percent.

20 Your Honor, I'm going to handle the  
21 Court's question, number 6 first, which was the --

22 THE COURT: Timing of the --

23 MR. CORRIGAN: -- timing of the  
24 conspiracy, yes, thank you. And we thought we would  
25 go back and do something a little bit on the

1 conspiracy to talk about, the evidence has been  
2 skirted around, and we've talked about, they've made  
3 criticisms of Dr. Beyer, that he shouldn't be opining  
4 on the conspiracy, that he should take the allegations  
5 as such.

6 So what we'll start with is the  
7 allegations in the complaint.

8 THE COURT: This is a Daubert related  
9 issue or not?

10 MR. CORRIGAN: I'm not sure, Your  
11 Honor, I really am not. But what I can say is, saying  
12 that Dr. Beyer should have relied on the complaint is  
13 just irresponsible. I mean, the complaint is filed  
14 before discovery, a great amount of discovery is  
15 taken, and that leads you to follow the evidence which  
16 is what Dr. Beyer did.

17 Courts have been instructed in Hydrogen  
18 Peroxide and Comcast to delve beyond the pleadings.  
19 Dr. Beyer did just that. He follows the evidence. If  
20 the evidence leads him to conclude in selecting a  
21 benchmark, that there was collusive activity in the  
22 fall of 2000, why would he go back to the complaint,  
23 so that he came in here and I would have to explain to  
24 Your Honor the reason he did that was because we told  
25 him to do it, in contrast to what the evidence showed

1 him?

2 Dr. Beyer followed the evidence, and  
3 the evidence is clear, that there was conspiratorial  
4 activities in the fall of 2000, polluting and tainting  
5 the BBLP benchmark, therefore, he didn't use it as a  
6 benchmark. It's not a proper benchmark, and I want to  
7 talk a little bit about why it's not in some detail.

8 THE COURT: Now, wait a minute. The  
9 criticism is the complaint describes the conspiracy as  
10 having started on or about January 1st, 2000. And in  
11 the -- in your pleadings, you've -- well, you departed  
12 from that. I'm talking about the consolidated amended  
13 complaint. The evidence, according to the plaintiffs,  
14 showed that the conspiratorial conduct began I think  
15 November 4th at the first meeting, and continued  
16 November 8th and thereafter, and it's really a  
17 November start date.

18 I don't know what the defense is going  
19 to argue on that, but general law on pleadings versus  
20 proofs is that pleadings are generally amended to  
21 reflect what is established by the proofs.

22 MR. CORRIGAN: That's a fair point,  
23 Your Honor. We have could amended this complaint at  
24 any time. I'm not sure what the --

25 THE COURT: I said, treat it as

1 amended. We're not amending the complaint.

2 MR. CORRIGAN: Thank you.

3 THE COURT: When -- I've forgotten when  
4 that complaint was filed, two thousand --

5 MR. CORRIGAN: 2010.

6 THE COURT: Yes, we're not amending a  
7 complaint five years after the fact. I don't think  
8 it's necessary. If I think after hearing argument on  
9 this in the event that defense argues, I'll let you  
10 respond. But I'm not troubled, as troubled as I was  
11 by the cost issue. I am not troubled by the start  
12 date of the conspiracy.

13 But there is a fuzzy issue and it  
14 relates to the second bucket on the selection of the  
15 OCV plan over the BBLP plan, and the fact that some of  
16 the documents on which you rely in using the OCV plan  
17 are actually BBLP plan documents.

18 MR. CORRIGAN: They're BBLP plan  
19 documents --

20 THE COURT: Yes.

21 MR. CORRIGAN: -- referring to the OCV.

22 THE COURT: So sayeth the plaintiffs.

23 MR. CORRIGAN: But the documents  
24 themselves say, stay the course, stay the course was  
25 the OCV plan.



1                   So just because it's a BBLP document,  
2   and I'm putting that in quotes, it refers to the state  
3   of course. They're trying to figure out what they're  
4   going to do. And in trying to make that decision,  
5   they refer to the OCV plan.

6                   So the fact that it's a BBLP document  
7   doesn't mean that it has to just refer to them. It's  
8   referring to option 1, which was stay the course five  
9   plus years of 25 percent increases. So I think that's  
10   immaterial, and the document is speaking of OCV and  
11   you can't say that it doesn't.

12                  THE COURT: Where is that? I want to  
13   go back to that. Where is that stay the course  
14   document? Is it in your slides? I don't think it is.

15                  MR. CORRIGAN: I don't think it's in  
16   our slides.

17                  THE COURT: Okay.

18                  MR. CORRIGAN: It's Plaintiff's Exhibit  
19   54. I think your clerk's got this one handy.

20                  (Clerk confers with the Court)

21                  MR. CORRIGAN: So this is a BBLP  
22   document, but it's referring to the choice they have.  
23   And one of the choices is, stay with the OCV plan.

24                  (Pause - Court and clerk confer)

25                  THE COURT: Okay. Yes, I had it

1     numbered differently. I thought so. It talks about  
2     traditional blood bank strategy options, that's what  
3     you're referring to?

4                     MR. CORRIGAN: Yes, Your Honor.

5                     THE COURT: It says, stay the course,  
6     continual, annual 25 percent increase. You added a  
7     little bit, for the next five years. The next five  
8     years is not in this particular document --

9                     MR. CORRIGAN: Your Honor, I'll -- let  
10    me --

11                    THE COURT: blood bank market  
12    correction plan to which you're referring is dated  
13    September 15th, 2000.

14                    MR. CORRIGAN: Your Honor, there's --

15                    THE COURT: And what you're saying is,  
16    stay the course means 25 percent increases for five  
17    years. That takes a lot of inventiveness.

18                    MR. CORRIGAN: Your Honor, I have  
19    another page from that very same document.

20                    THE COURT: Okay. Go there.

21                    MR. CORRIGAN: What page number did you  
22    --

23                    UNIDENTIFIED: It ends in 70, Your  
24    Honor.

25                    THE COURT: I think I have it. Yes.

1 MR. CORRIGAN: See the one at the  
2 bottom?

3 THE COURT: It says, "create a health  
4 market."

5 MR. CORRIGAN: Yes, that's another word  
6 for the -- that's another name for the BBLP plan. So  
7 this is a BBLP plan document, but one of the options  
8 is referred to in the last bullet point there.

9 THE COURT: Is one market correction --  
10 one major market correction versus five plus years of  
11 annual 25 percent price increasing.

12 MR. CORRIGAN: So that's what -- that's  
13 one of the bases for Dr. Beyer extending the OCV plan.  
14 Your Honor, he based it on Ortho's  
15 documents. And I've cited case law, and I'm going to  
16 cite it again. It has --

17 THE COURT: No, no, you don't have to  
18 cite that case law. The question is, is the reliance  
19 on the Ortho documents to reach the conclusions  
20 reached by Dr. Beyer reasonable, and is it reliable.  
21 Not for authority, certainly you can rely on Ortho  
22 documents and the major market correction to which  
23 reference is made in this latter document, the one  
24 ending in Bates number 70, major market correction,  
25 what does that --

1                   MR. CORRIGAN: That's the BBLP, should  
2 we do the BBLP and raise prices 2 to 300 percent in  
3 one fell swoop, or should we do what we've been doing  
4 and continue, you know, five plus years of annual 25  
5 percent price increases.

6                   THE COURT: Is this the best evidence  
7 you have on the 5 plus years?

8                   MR. CORRIGAN: This along with the stay  
9 the course, the document you saw earlier. But it's  
10 also, Your Honor, it's a conservative estimate. I  
11 mean, 25 percent price increases over five years, at  
12 the end of five years is more than 300 percent.

13                   As the Court pointed out in its  
14 opinion, that takes into account market structure.  
15 Okay. The but for world we have, gives them 300  
16 percent price increase. If they -- and we've talked  
17 about some conspiratorial, where the but for world  
18 diverts from the actual word, or what I call the  
19 conspiracy world, they got higher increases, but Dr.  
20 Beyer's OCV benchmark allows them for 300 plus price  
21 increases in five years. That accounts for the  
22 structure, market structure. That accounts for the  
23 duopoly and it's reasonable.

24                   Under their method, there is no way to  
25 do it, to find damages in this case. You can't do it

1 by regression, you can't do it by the market plan, and  
2 you can't do it by BBLP, and I do have some slides on  
3 that.

4 THE COURT: All right.

5 MR. CORRIGAN: They've continually said  
6 that BBLP meets Dr. Beyer's criteria for proper  
7 benchmark, and that is absolutely false. I said  
8 yesterday, that the BBLP was riddled with conspiracy,  
9 and I have some slides on that.

10 THE COURT: Fine.

11 MR. CORRIGAN: I didn't know we'd have  
12 to use them, but we do I think.

13 THE COURT: Use them.

14 MR. CORRIGAN: Thank you, Your Honor.

15 This is slide 7, Your Honor. I'm  
16 sorry, I've jumped around a little bit already --

17 THE COURT: No, that's all right. Let  
18 me get --

19 MR. CORRIGAN: If you can go to slide 7  
20 of the day 2 that I handed you up today. So I've got  
21 to -- I'm sorry.

22 Okay. We have outline of a conspiracy.  
23 This just sort of outlines the evidence, all right.  
24 Number one there, do you have that, Your Honor?

25 THE COURT: I do.

1 MR. CORRIGAN: Ortho abandoned  
2 extensively researched post duopoly pricing strategy,  
3 OCV 25 percent in favor of a drastically more  
4 aggressive pricing structure, BBLP 200 percent.  
5 That's unchallenged. They did that.

6 Two, at the same time, Immucor  
7 abandoned its post duopoly pricing strategy 20  
8 percent, based on Ortho's change to aggressive  
9 strategy, undisputed as well.

10 Three, decisions to change to more  
11 aggressive pricing strategy, not based on any change  
12 in market structure, costs or demand, also  
13 unchallenged. There's a lot of talk about costs, but  
14 they're not saying they went with a market correction  
15 plan instead of OCV based on rising costs, even Ortho  
16 didn't say that.

17 And number four, the changes were  
18 implemented immediately after direct communications  
19 between defense. Now, let's talk about some of those  
20 direct communications.

21 THE COURT: You're talking about  
22 between November 4th and 8th --

23 MR. CORRIGAN: Yes.

24 THE COURT: -- and thereafter?

25 MR. CORRIGAN: Yes. See, the

1 difference in what they did in OCV and what they did  
2 in BBLP is important in Dr. Beyer's selection of  
3 benchmark. The OCV plan, they paid a consultant.  
4 They debated, they thought about it.

5 The BBLP, they hold a presentation in a  
6 booth right down the hallway from Ortho -- I'm sorry,  
7 from Immucor, announcing a drastic pricing change.  
8 That's very different from their behavior, including  
9 with OCV.

10 Now, let's take a look at that. Let's  
11 take a look. This is -- hold on one second. This is  
12 testimony from Ed Gallup. Ed Gallup was the President  
13 of Immucor, and he was talking -- he's talking here  
14 about going to see Ortho's presentation at the AABB.  
15 And there's several people who have been deposed that  
16 said they hadn't seen a presentation like this at  
17 AABB. This was something different.

18 Let's see Mr. Gallup first.

19 (Video played)

20 MR. CORRIGAN: Your Honor, this is the  
21 President of Immucor watching an Ortho presentation  
22 concerning the BBLP, okay.

23 Now, conspirators, the enemy of  
24 conspirators is uncertainty. Conspiracies rise in  
25 uncertainty. Now, Ms. Burzik, Cathy Burzik was the

1 President of Ortho at this time. And we have some  
2 testimony from Mike Poynter, okay, Mike Poynter was a  
3 top sales official at Immucor, and he's talking about  
4 what happened at this very same 2000 AABB meeting.

5 "During the AABB meeting, Catherine  
6 Burzik, Ortho's President came to the --"

7 THE COURT: You're referring to slide 9  
8 now?

9 MR. CORRIGAN: Yes, Your Honor, I'm  
10 sorry.

11 THE COURT: In the slides for today.

12 MR. CORRIGAN: Yes.

13 "Catherine Burzik came to the Immucor  
14 booth and introduced herself to me as the  
15 President of Ortho. She gave me her  
16 business card and asked me to pass it  
17 along to Ed Gallup because she wanted to  
18 speak with him."

19 Okay. We go back to the highlighted  
20 language down further the paragraph.

21 "She also asked if I had seen Ortho's  
22 presentation and invited me to come to the  
23 Ortho booth and see it."

24 That's the presentation Gallup was just  
25 talking about, announcing a dramatic increase in



1 price.

2 At the bottom of this, it says,

3 "Later on, I did pass along Ms.

4 Burzik's business card to Mr. Gallup, and

5 conveyed her request to speak with him."

6 The president of the company walks into

7 the booth of the same AABB and says she wants to talk

8 to the president of the only other competitor in the

9 business on the eve of a humongous price increase. A

10 little unconventional. But again, uncertainty, let's

11 try to get rid of the uncertainty.

12 Okay. So let's see what Ed Gallup

13 says. We have a little testimony from Judy Thorne,

14 her name is Cangiamilla, that was her maiden name, and

15 she testifies about what Immucor people did after

16 seeing this presentation.

17 (Video played)

18 MR. CORRIGAN: So the presentation --

19 THE COURT: What was Judy Thorne's

20 position then?

21 MR. CORRIGAN: She was director of -- I

22 think she was director of sales. She was an executive

23 at Immucor. I think it was director of sales, but she

24 wasn't a lower level person, she was an executive.

25 So the presentation has this desired

1 effect, all these Immucor people see it, and Ed Gallup  
2 says, I want to go talk to the President of Ortho.  
3 That was the whole point.

4 Now, we have another snippet of  
5 testimony from a gentleman named David Gendusa.  
6 Gendusa was an executive at Ortho. Now, his testimony  
7 was pretty -- was somewhat bizarre, in that he said  
8 that someone from Ortho had asked him to introduce  
9 them to Ed Gallup. See, Gendusa knew Gallup, so  
10 somebody at Ortho, and he couldn't remember who, said,  
11 hey, I'd like to meet Ed Gallup.

12 All right. So while he kept saying he  
13 couldn't remember who, he did say something that sort  
14 of clarified who he was talking about. And let's see  
15 the clip from Mr. Gendusa, please.

16 (Video played)

17 MR. CORRIGAN: So he wouldn't say who,  
18 but he refers to the two presidents, which only makes  
19 sense because Burzik wants to meet Gallup, Gallup  
20 wants to meet Burzik. Okay. So I've got another  
21 slide there. Okay. So I sort of summarized that  
22 testimony there, Your Honor, Gallup/Burzik, and we  
23 quote Gendusa, two presidents get together.

24 Okay. Poynter said, Burzik gave me  
25 your business card, and asked me to pass it along to

1 Ed Gallup, because she wanted to speak with him.  
2 Vaughn (ph) said, and Ed said he was going to try to  
3 meet with the President of Ortho to see if they can  
4 find out more information. Gendusa then produced two  
5 high ranking -- introduced high ranking Ortho  
6 executive, Ed Gallup, the two presidents of a company  
7 to get together just to say hello.

8 So these two presidents are going to  
9 get together on the eve of the AABB, in light of the  
10 presentation announcing the dramatic price increase.  
11 That's just the beginning, Your Honor, there's more.

12 Now, the Court saw this evidence the  
13 last time, it was a long time ago, but here's from the  
14 Court's opinion on this very point.

15 THE COURT: Where are you, what slide?

16 MR. CORRIGAN: On slide number --

17 UNIDENTIFIED: 15.

18 MR. CORRIGAN: -- 15, Your Honor.

19 This is a quote from the Court's  
20 opinion, "Plaintiff's theory that Ortho began to  
21 consider the BBLP before the AABB meetings, but would  
22 not have executed the plan without explicit assurance  
23 that Immucor would follow, is highly plausible and  
24 consistent with documents showing that the BBLP only  
25 became fully operational after the meetings."

1                   That's a significant finding that was  
2     untouched by the Third Circuit, has nothing to do  
3     anything what Dr. Beyer said. That's pure evidence.  
4     But it's instructive on why Dr. Beyer selected OCV as  
5     a benchmark and why the BBLP is totally inappropriate  
6     as a benchmark.

7                   Your Honor, there's more. I want to  
8     show you a little bit of clip. Ed Gallup met with  
9     Judy Thorne, but he didn't just stop at that. Because  
10    uncertainty is the enemy of conspiracy, he wanted more  
11    information. So he asked Judy Thorne to go meet with  
12    her old friend, David Gendusa, who was an executive at  
13    Ortho. And here's what she said about that.

14                  THE COURT: What slide?

15                  MR. CORRIGAN: This is slide 13.

16                  (Video played)

17                  MR. CORRIGAN: Your Honor, this is the  
18    discussion of the BBL prices, which the letter hadn't  
19    gone out yet, or it went out that day, but they hadn't  
20    been implemented yet as the Court pointed out. This  
21    is about the BBLP. This is about the pricing program  
22    that Ortho says should've been used as a benchmark, or  
23    could've been.

24                  I have one more clip from Judy  
25    Cangiamilla, if you could, please. This is what

1 happens when she goes back to Ed Gallup and tells him  
2 about her lunch.

3 (Video played)

4 THE COURT: What slide?

5 MR. CORRIGAN: I'm sorry, Your Honor,  
6 14. 14.

7 (Video played)

8 MR. CORRIGAN: Your Honor, I've said  
9 this before, but the expense situation is a classic --  
10 when I was a prosecutor, we used to call that  
11 consciousness of guilt. Also, Mr. Gendusa holding the  
12 price list in his brief case, so no one would see what  
13 he's doing. They understand what's going on. This is  
14 the BBLP price list. How on earth could Dr. Beyer  
15 have used that as a proper benchmark? The answer is,  
16 he couldn't have.

17 So then the question comes up, how do  
18 you say, how do you criticize Dr. Beyer from that.  
19 Now, in Dr. Bronstein's deposition, I deposed Dr.  
20 Bronstein in March of 2012. And I asked him if he  
21 read Judy Thorne's testimony in this case, and he said  
22 he read a snippet of her employment action against  
23 Immucor.

24 I asked him if he had read Ed Gallup's  
25 testimony in this case, and it turns out he wasn't

1 even aware at that time that Ed Gallup had been  
2 deposed. Ed Gallup is the President of Immucor.

3 So later at the Court's class  
4 certification hearing, I asked him some similar  
5 questions, and if you could take a look, Judge, at  
6 slide 16. This was the Court's hearing. So I asked  
7 him at the Court's hearing to see if he'd done  
8 anything about it since. If you'd follow along at the  
9 top starting with line 22,

10 "When I deposed back you in  
11 March, you had not read --"

12 It says July, but it should be,

13 "-- Judy Thorne's testimony,  
14 her deposition. Have you read that  
15 since?

16 "I believe what I said was that  
17 I read the excerpt that was cited by  
18 Dr. Beyer.

19 "Have you read her deposition  
20 testimony that was taken in this case?

21 "(Pause)

22 "I don't believe I have, other  
23 than the excerpt that Dr. Beyers  
24 cited.

25 "Q Why not?

1                    "It's not clear to me that there  
2                    is anything in that report that would  
3                    go to the issues that are relevant for  
4                    me in terms of evaluating Dr. Beyer's  
5                    report. As I mentioned, I did read  
6                    the excerpt he relied on, but nothing  
7                    more than that."

8                    Next page, Your Honor, slide 17,

9                    "Q     Did you read Ed Gallup's  
10                  deposition testimony in this case?

11                  "A     I looked at testimony  
12                  from him in the FTC case, but I don't  
13                  believe I saw his testimony in this  
14                  case.

15                  "Did you read David Gendusa's  
16                  testimony in this case?

17                  "A     I don't believe so. I  
18                  don't recall Dr. Beyers citing  
19                  anything from that. If he did, I  
20                  would have. Essentially what I did  
21                  is look at his reply report, look at  
22                  the testimony cited, and I read  
23                  that.

24                  "Q     Did you read Nino  
25                  Decurico's (ph) testimony in that

1 case?

2 "A Yes.

3 "Why did you read that and not  
4 the others?"

5 And here's an important answer,

6 "The attorneys gave me a set of  
7 depositions that I thought they  
8 thought I might want to look through  
9 and that was one of them."

10 So the attorneys set him a set of  
11 depositions that don't include the three I displayed.  
12 They don't include Thorne, Gallup or Gendusa, which  
13 involved a lot of conspiracy evidence.

14 So you still have -- Dr. Bronstein  
15 doesn't read the evidence. He doesn't do his  
16 homework, but yet he criticizes Dr. Beyer for  
17 selecting the wrong benchmark. And if the Court will  
18 look, we see at the top of that, the last two slides,  
19 our heading is "Dr. Bronstein's opinions don't fit the  
20 facts." We're talking in language of Daubert. And  
21 his opinions clearly don't fit the facts.

22 We have one more slide on Dr.  
23 Bronstein, Your Honor, and that would be slide 18.  
24 Now, this is from Dr. Bronstein's report, and Ortho  
25 cites it in their brief. But it's page 30 of Dr.



1 Bronstein's report, note 85.

2 And if you look at the highlighted  
3 portion there, it says, "First, Dr. Beyer does not  
4 address the possibility that the alleged cartel would  
5 be concerned that its illicit activities would be  
6 detected."

7 Now, you saw Ed Gallup phonying up the  
8 expense voucher, you saw David Gendusa holding the  
9 price list in his briefcase, so there were concerns of  
10 illicit activity would be detected, but Bronstein  
11 didn't read that testimony. And if you follow along,  
12 it gets better.

13 In parenthesis there, "A conservative  
14 duopoly would not share, and therefore, would have  
15 opted for more modest price increases than  
16 contemplated by Ortho's market correction plan."

17 What Bronstein is saying is, the size  
18 of the increases means that they're duopolists.  
19 Because if they were conspirators, they wouldn't have  
20 had the nerve to do such incredibly high price  
21 increases.

22 So I guess if Immucor and Ortho had  
23 known this, if they'd had the benefit of this  
24 testimony when they were raising prices 2,000 percent,  
25 maybe they would've raised it 10,000 percent just to

1 really throw us off the scent. And that's the kind of  
2 opinion you give when you don't do your homework, when  
3 you haven't read the conspiratorial evidence, but you  
4 still feel comfortable criticizing the other expert  
5 for selecting the wrong benchmark.

6 I have one more slide, Your Honor, I  
7 know the Story Parchment has been beaten to death, but  
8 let's try it one more time.

9 The actual quote there -- this is slide  
10 No. --

11 THE COURT: What --

12 MR. CORRIGAN: -- 19, Your Honor, I'm  
13 sorry.

14 THE COURT: Fine.

15 MR. CORRIGAN: Slide No. 19. Now, the  
16 actual quote there is the wrongdoer, but after the  
17 testimony we just saw, we feel comfortable inserting  
18 Ortho in there. Ortho is not entitled to complain  
19 that damages cannot be measured with the exactness and  
20 precision that would be possible if the case, which he  
21 alone is responsible for making, or otherwise.

22 THE COURT: Well, we've been over that,  
23 and Mr. St. Antoine made the point that that's talking  
24 about damages, and that's separate and apart from the  
25 antitrust injury.

1 MR. CORRIGAN: That's separate, but  
2 they're criticizing his damages model in the impact  
3 arena. And the reason they're trying to do that is  
4 because that's the standard of the damage.

5 All the Court's citations to this -- to  
6 the Beyer language, which has now been excised, all  
7 your citations to that language are in your damages  
8 section, not surprising.

9 The other evidence we provided for  
10 impact is largely untouched. We did use Dr. Beyer's  
11 damages methodology to confirm impact as a fifth  
12 source of common impact, so it's true, we did use it  
13 as evidence of impact, but it's his damages  
14 methodology. They like to attack the impact, because  
15 they think the standards don't. They don't like to  
16 attack the damages, because they understand the  
17 standard as well as we do.

18 Your Honor, that will be number 6.  
19 That's all I have on number 6. And I would like to go  
20 to number 5.

21 THE COURT: Let's take a very brief  
22 recess. It's 11 -- almost 11:30, let's take a ten  
23 minute recess.

24 MR. CORRIGAN: Thank you, Your Honor.

25 THE CLERK: All rise.

1 (Recessed at 11:28 p.m.; reconvened at 11:49  
2 p.m.)

3 THE CLERK: All rise.

4 THE COURT: Be seated, everyone.

5 You may proceed.

6 MR. CORRIGAN: Thank you, Your Honor.

7 I'm going to start with the Court's issue number 5,  
8 which I believe was using Dr. Beyer's OCV benchmark as  
9 he -- the reliability of using a business plan as a  
10 benchmark. And to start the --

11 THE COURT: Well, the cases are legend  
12 that you can use a business plan, and you've addressed  
13 the question -- well, you -- I thought you'd addressed  
14 it already. There's a certain overlap between the  
15 arguments. I've tried to distill the arguments from  
16 defendant's lead brief. But haven't you argued that?

17 MR. CORRIGAN: I have.

18 THE COURT: The question is, is what he  
19 did reliable, and that's what we spent all day  
20 yesterday and much of today on.

21 MR. CORRIGAN: You're right, Your  
22 Honor, I'm sort of -- yes, I'm going to address the  
23 reliability of his benchmark. I thought that part of  
24 the issue was whether you could use a bench plan as a  
25 benchmark -- I'm sorry a business plan as a benchmark.

1 THE COURT: No, you can. The cases say  
2 you can. The question is whether this was an  
3 appropriate business plan and whether he relied on it,  
4 whether there was evidence of the things that he said  
5 in the report, for example, extending the plan from --  
6 a two year plan to a five year plan. I think that's  
7 the issue that -- a major issue, and that was  
8 addressed yesterday and again this morning.

9 But you're right, there is some overlap  
10 between, as the arguments have unfolded between that  
11 argument and the argument relating to selection of the  
12 OCV plan or the BBLP plan, but I'll hear what you have  
13 to say.

14 MR. CORRIGAN: Your Honor, one point of  
15 clarification in my earlier remarks, I said that the  
16 Judy Thorne/David Gendusa meeting took place on  
17 November 1st, the same day that Ortho's price and  
18 letters went out. Let me just modify that. Those  
19 letters only went to a few select customers, they  
20 didn't go to all Ortho's customers. I wanted to  
21 clarify that.

22 Your Honor, I thought that one of the  
23 best way of doing this was to have a clip of Dr.  
24 Beyer, sort of explaining why he thinks that the OCV  
25 benchmark is reliable. It's a little longer than I

1 normally like, but I thought that this was an  
2 important point for the Court so I'd like to play a  
3 clip from Dr. Beyer please.

4 THE COURT: Do you have it in here or  
5 no?

6 MR. CORRIGAN: Yes, Your Honor. It's  
7 slide number 3 and as we go through it, slides number  
8 4 and slides number 5 will appear on the screen.  
9 Slide number 3 is the testimony, slide 4 is an outline  
10 that he's referring to as he testifies, and slide  
11 number 5 is something he refers to at one point in his  
12 testimony.

13 THE COURT: All right.

14 MR. CORRIGAN: So if we could have  
15 that, let's see what Dr. Beyer says.

16 (Video played)

17 MR. CORRIGAN: And that's slide number  
18 4, Your Honor.

19 (Video played)

20 MR. CORRIGAN: Your Honor, two points  
21 I'll make about Dr. Beyer's testimony. That last part  
22 about the coordinated conduct, that's in direct  
23 contrast to what we saw surrounding the BBLP, which I  
24 demonstrated a few minutes ago.

25 Secondly, Dr. Beyer upon the transfer

1 on screen 3 -- on slide 3, towards the top, and I know  
2 it's a little hard to see, but Dr. Beyer talks about  
3 the explicit concern about Immucor's response, and  
4 Ortho had said before, what the BBLP was concerned  
5 about Immucor's response as well.

6 The significant differences --

7 THE COURT: Well, I didn't understand  
8 that. I have not seen any evidence of Ortho's concern  
9 about Immucor's response to OCV.

10 MR. CORRIGAN: In some of the documents  
11 they do model, and as Dr. Beyer said they rejected  
12 larger increases. They looked at a hundred percent  
13 increase and said, you know what, too risky. If we do  
14 a hundred percent increase and Immucor doesn't follow  
15 us, we're going to lose a lot of business.

16 So that was part of the modeling that  
17 Norbridge helped them with, to try to figure out, do  
18 we ask for a lot but not too much. They settled on  
19 the 25 plus 25, okay.

20 Now, they did -- they were concerned  
21 about Immucor response, and they did, as he said,  
22 accept moderate risk. Ortho counsel has pointed out  
23 but also the BBLP documents also talk about concern  
24 with Immucor's response.

25 THE COURT: Yes.

1 MR. CORRIGAN: The significant  
2 difference is that -- and OCV they took no action on  
3 that other than modeling it. And the BBLP they took  
4 significant action to make sure Immucor followed. So  
5 the -- all the communications that we saw before, that  
6 was the BBLP plan for dealing with Immucor's potential  
7 response; go meet with the president, and go show him  
8 the price list.

9 So even though some of the earlier BBLP  
10 documents say the same things that the OCV documents,  
11 the actions are very different.

12 And as the Court's pointed out, I said  
13 there was two years of 25 percent, but later on, of  
14 course, we saw the BBLP documents talked about annual  
15 increases and five (ph) costs, but we've been through  
16 that before.

17 Your Honor, I just -- as I've shown  
18 before, I did have that last screen up and I've shown  
19 you this before, I won't spend much time on this, but  
20 the one about the law, the case law.

21 THE COURT: About the what?

22 MR. CORRIGAN: The case law, I'm  
23 looking for it now. The ZF Meritor, way back, I'm  
24 sure I've messed this up.

25 UNIDENTIFIED: I don't think it's 6.



1 MR. CORRIGAN: Did you have --

2 UNIDENTIFIED: 6.

3 MR. CORRIGAN: Yeah, I'm sorry. I  
4 won't belabor this because the Court's already said  
5 there's case law that says this. And the second case  
6 there is this Auto S (ph) case. Now again, that's a  
7 Second Circuit 1970 case. I would not normally have  
8 cited that.

9 THE COURT: But it was cited in --

10 MR. CORRIGAN: Cited in the Third  
11 Circuit. Mr. Coe tried to distinguish that case  
12 yesterday, but the language -- ZF Meritor --

13 THE COURT: Let me see the language.  
14 What slide?

15 MR. CORRIGAN: It's slide number --

16 UNIDENTIFIED: 6.

17 MR. CORRIGAN: -- 6.

18 THE COURT: Of the original slides?

19 MR. CORRIGAN: Yes. No, I'm sorry,  
20 today's slides. I'm just -- I'm fumbling around to  
21 throw you off, but it's today -- it's slide 6 of  
22 today's slides.

23 THE COURT: All right. I have it.

24 MR. CORRIGAN: Okay. The top -- the  
25 heading of this is also a quote from ZF Meritor which

1 again is a Third Circuit case, 2012. And this  
2 demonstrates exactly what Dr. Beyer's talking about.

3 The first bullet point, "businesses are  
4 generally well informed about the industries in which  
5 they operate, and have incentives to develop accurate  
6 projections. As such, experts frequently use a  
7 business plan to estimate expected profits in the  
8 absence of misconduct."

9 Now, the top -- the heading is where ZF  
10 Meritor cites the Auto West case. So they've revived  
11 this 1970 Second Circuit case. The Auto West case is  
12 a good read also. The Auto West case is analogous to  
13 the Ortho situation.

14 We saw in one of those BBLP planning  
15 docs that one of Ortho's options was to exit the  
16 business. So this is not a decision that is being  
17 made lightly. When one of the options is to exit the  
18 business, you better have your projections right.

19 The Auto West case says, Your Honor,  
20 and it's slightly different. I have a quote there  
21 saying, "damages testimony admissible because the  
22 financial projections on which the testimony was based  
23 were the product of deliberation by experienced  
24 businessmen, charting their future course."

25 The case goes on to say, "These

1 projections were no mere interested guests prepared  
2 with an eye on litigation. In December 1965, Auto  
3 West reached a critical juncture. The officers had to  
4 decide whether it would be profitable than to remain  
5 in California as a Puget distributor, or if there were  
6 no sale (indiscernible). The projections were used to  
7 arrive at the conclusion to keep and they acted upon  
8 it." It's right out of this case.

9                   They're on the brink of whether we go  
10 out of business or not, so this better be reliable,  
11 you better sharpen your pencils on this one.

12                   And the last case I just mentioned,  
13 Your Honor, is the chocolate case, again the Court  
14 just decided, a defendant generated analysis, there  
15 was a Daubert motion filed in that case in chocolate,  
16 the expert survived, and the Court said that Dr.  
17 Tollison addressed the impact of branding his opinion  
18 based on the evidentiary record, which was a defendant  
19 generated analysis.

20                   Your Honor, if you have no more  
21 questions, I'll move to the last segment, which is  
22 number 7, which was I believe the Court's --

23                   THE COURT: Averaging. I'm sorry, no,  
24 no --

25                   MR. CORRIGAN: Shifting the OCV

1 benchmark date from January of 2000 to January of  
2 2001; is that right? I believe.

3 THE COURT: Yes.

4 MR. CORRIGAN: Okay. Your Honor, I  
5 have a screen -- a slide up there, and this is slide  
6 number 20. Now, Dr. Beyer's initial report set the  
7 beginning of the but for world in January of 2000.

8 In his reply report, he changed it to  
9 January of 2001. And Ortho was consistently said he  
10 did that to gerrymander and skew the results. But I  
11 think it was -- I'm not sure if it was Dr. Bronstein's  
12 deposition or his hearing testimony, but I asked the  
13 question,

14 "If you had a model and you had  
15 some time to make it better and improve  
16 it, would you do it?"

17 And he said,

18 "Of course, you have an obligation  
19 to do so."

20 So between the initial report and this  
21 report, Dr. Beyer improved his model, and here's why  
22 it's justified.

23 In the highlighted portion,

24 "Since I concluded that the impact  
25 from price cooperation began only in

1                   2001,"

2                   Okay, there's conspiratorial activity  
3   in 2000 but the price increase wasn't charged to  
4   anyone until January 2001. So essentially it makes no  
5   sense to start the but for prices before the  
6   conspiracy had any impact. And that's what he said.

7                   "It is more accurate for but for  
8                   prices to equal actual prices in 2000,  
9                   and to have but for prices only start  
10                  diverging in actual prices in 2001.  
11                  This is because it appears that the  
12                  initiations of the larger price  
13                  increase which began in 2001 did not  
14                  cause a delay to the price increases  
15                  that were already on the way in 2000."  
16                  And the last highlighted portion,

17                  "Thus setting the but for prices  
18                  equal to actual prices in 2000, and  
19                  beginning the but for prices in 2001  
20                  instead of 2000 results in a more  
21                  realistic model of the but for world."

22                  That's the business he's in, making it  
23   as realistic as possible, and this change which he's  
24   demonstrated why he did it makes it more reliable.

25                  Now, Ortho has criticized him for this

1 change in the date. Now, let's take a look at the  
2 next slide, number 21. And that's also in Dr. Beyer's  
3 hearing testimony presentation. And the title is  
4 "Base year change does not affect conclusions on  
5 impact."

6 Your Honor, at the bottom, there are  
7 two lines and you can barely see them because they  
8 overlap. There's a very thin red line and a very thin  
9 green line, and those are the but for prices. The red  
10 line is if you start the but for pricing in 2001, and  
11 the green line is if you start the but for price in  
12 2000.

13 Of course, the skyrocketing blue line  
14 is the actual price. And as you can see, whether you  
15 start it in 2000 or 2001 makes no difference to the  
16 conclusion. All it does is make the model more  
17 accurate.

18 And not only does Dr. Beyer think that  
19 it made it more accurate, let's take a look at the  
20 next slide, which is slide number 22.

21 THE COURT: There's no explanation of  
22 this on that chart.

23 MR. CORRIGAN: He does testify about  
24 it, Your Honor --

25 THE COURT: Oh, I'm sorry, I'm sorry, I

1     didn't --

2                   MR. CORRIGAN:   Okay.   I did not include  
3     his testimony on that, but it is in the record.

4                   THE COURT:   I don't need it, I just  
5     need a magnifying glass.

6                   MR. CORRIGAN:   Yes, I'm sorry about  
7     that.

8                   THE COURT:   Blue is the actual price.

9                   MR. CORRIGAN:   Yes.

10                  THE COURT:   Red is the but for price  
11     starting in 2001.

12                  MR. CORRIGAN:   Yes.

13                  THE COURT:   And the green is the but  
14     for price starting in 2000.   I see that now.

15                  MR. CORRIGAN:   Your Honor, the last  
16     slide, which is slide number 22, involves this Court's  
17     finding on this very issue.   And the title, "Ortho  
18     disagrees with this Court's factual finding which was  
19     untouched by the Third Circuit."

20                  Ortho has a hard time making this  
21     argument in light of the Court's opinion, so what they  
22     do is they just disagree with it.   The Court said, Dr.  
23     Beyer provides a persuasive, that's the language of  
24     Hydrogen Peroxide which I argued yesterday, is higher  
25     than the standard of Daubert, persuasive explanation

1 for his decision to change the start of the but for  
2 pricing from 2000 to 2001, which he did "because the  
3 alleged pricing fixing conspiracy did not begin to  
4 impact customers until 2001, neither defendant imposed  
5 a substantial price increases until early 2001, thus  
6 plaintiffs do not allege prices increased in 2000, due  
7 to unlawful collusion. It is more accurate for but  
8 for prices to equal actual prices in 2000 than to have  
9 but for prices only start diverging from actual prices  
10 in 2001."

11 Makes perfect sense. What's Ortho's  
12 response? Dr. Beyer acknowledged that the  
13 gerrymandered the start of the date, and he did so in  
14 order to reduce the number of reagents of actual  
15 prices that were below his but for prices between 2000  
16 and 2001.

17 So even in light of the Court's  
18 opinion, they disagree with your finding, which again  
19 was untouched by the Third Circuit.

20 Your Honor, that's all I have for 5, 6  
21 and 7, unless the Court has any questions.

22 THE COURT: I don't.

23 MR. CORRIGAN: Thank you.

24 THE COURT: Mr. St. Antoine.

25 MR. ST. ANTOINE: Good afternoon, Your



1 Honor.

2 THE COURT: Afternoon.

3 MR. ST. ANTOINE: Paul St. Antoine on  
4 behalf of Defendant, Ortho Clinical Diagnostics.

5 I want to begin by making the  
6 observation that what we were discussing in terms of  
7 benchmark or a but for price, we're discussing Dr.  
8 Beyer's selection of a benchmark. We're not talking  
9 about plaintiff's view of the world, we're not talking  
10 about Mr. Corrigan's arguments about what the evidence  
11 means in terms of a conspiracy. We're asking  
12 ourselves whether Dr. Beyer made a reliable selection  
13 of a benchmark relying on his information and what he  
14 took into account in selecting that benchmark.

15 And what Dr. Beyer has done in this  
16 case is something extraordinary. Different from what  
17 he's done in other cases, Your Honor. What Dr. Beyer  
18 has done is he's created his own timetable for the  
19 actionable conduct.

20 This is unlike what experts do  
21 including Dr. Beyer in other cases. In other cases,  
22 Your Honor, experts will accept not just the existence  
23 of a conspiracy, but also the timing of a conspiracy.  
24 And if I might, Your Honor, I'd like to illustrate  
25 this point by showing you a timetable from the

1 linerboard case, which I know this Court is very  
2 familiar with, and which also included Dr. Beyer as  
3 the class expert.

4 And if we could pull up that slide.

5 THE COURT: Which slide is it?

6 MR. ST. ANTOINE: It's number 6, Your  
7 Honor.

8 THE COURT: I have it.

9 MR. ST. ANTOINE: Your Honor, in  
10 linerboard, the conspiracy, as the Court may recall  
11 was to take down time in the production of linerboard.  
12 Linerboard was the hard product that was used to  
13 create corrugated boxes and corrugated sheets. And  
14 the theory was that by the companies engaging in a  
15 conspiracy to reduce supply of linerboard beginning in  
16 late June and early July 1993. That led to an  
17 inflation of prices of corrugated boxes and sheets  
18 from October 1st, 1993 through November 30th, 1995.

19 Dr. Beyer was retained as the expert on  
20 anti-trust impact and damages by the class plaintiffs.  
21 And in his declaration submitted to the Court, he  
22 opined that he could build a model of but for prices  
23 using market data that preceded the alleged  
24 conspiracy.

25 And in that case, Your Honor, he didn't

1 have to come up with his own date of when the  
2 conspiracy began. He certainly didn't have to assume  
3 that the conspiracy ever incepted. He simply had a  
4 period of time when nobody was alleging a conspiracy,  
5 certainly not the defendants and not the plaintiffs.  
6 This was a period of time when everyone agreed the  
7 market prices and the inputs were untainted by  
8 conspiracy.

9 In contrast, Your Honor, in this case,  
10 this is the next page on the slide presentation, we  
11 have a much different circumstance. We've talked  
12 about the inception of the alleged duopoly in April of  
13 1999. On that basis, Dr. Beyer opines that he cannot  
14 rely upon data in a before period, so --

15 THE COURT: Because the market  
16 structure changed, so you're not quarreling with that.

17 MR. ST. ANTOINE: We're not -- we  
18 understand his position and we accept the proposition  
19 that he absolutely has to account for the change in  
20 market structure.

21 What we're not necessarily accepting,  
22 Your Honor, is that it rules out the use of market  
23 data entirely, whether from blood reagents or from  
24 some other comparable product.

25 But what Dr. Beyer does is he takes a

1 business plan, as we've talked about to a great extent  
2 during this hearing, the operation to create value  
3 plan which was adopted by Ortho in January of 2000.

4 But there is a problem on -- in  
5 squaring that use of the operation to create value  
6 plan with the allegations in the complaint, because  
7 according to the plaintiffs, the conspiracy began at  
8 least by January 1, 2000.

9 And using Dr. Beyer's own benchmark  
10 selection criteria, he can't pick a benchmark that  
11 overlaps with the period of the alleged conspiracy.

12 THE COURT: Well, the plaintiff's  
13 answer to that is, that was what they thought when  
14 they filed the complaint, but as the evidence  
15 unfolded, it developed, at least from the plaintiff's  
16 perspective with the conspiratorial conduct, did not  
17 begin until November of 2000.

18 MR. ST. ANTOINE: Well, there's two  
19 responses to that first. Your Honor, that's actually  
20 not the position that the plaintiff's counsel took at  
21 the earlier hearing on class certification when the  
22 discovery at that point was complete.

23 THE COURT: Is the position he's taking  
24 now.

25 MR. ST. ANTOINE: But nothing in terms

1 of fact discovery and the development of the record  
2 has changed.

3 THE COURT: All right. What position,  
4 refresh my recollection, on the position plaintiff's  
5 counsel took on the inception of the conspiracy when  
6 we argued class certification in 2012?

7 MR. ST. ANTOINE: On page 148, Your  
8 Honor, of the hearing transcript, the Court asked Mr.  
9 Corrigan this question,

10 "Is there any reason why you  
11 haven't changed the date of the class  
12 definition to correspond to the  
13 damages?"

14 And Mr. Corrigan responds,

15 "The main reason, Judge, is that  
16 there is conduct in 2000 that we think  
17 is appropriate to the conspiracy, so  
18 while the damages period starts in '01  
19 we kept 2000 to keep some of the  
20 conspiratorial -- what we think is  
21 conspiratorial conduct earlier than  
22 that. I don't think there's a major  
23 problem with changing the date,  
24 because when it comes time to figure  
25 out damages, either from the Immucor

1 settlement or from something with Ortho  
2 we're going to start at January of  
3 '01.

4 "So we've lost a year's worth of  
5 damages there, generally plaintiff's  
6 counsels don't like to do that, but we  
7 follow the evidence as our economist  
8 tells us it is. And he says it starts  
9 in '01, and that's when the damages  
10 will be calculated."

11 THE COURT: But the class definition  
12 says January 1st, 2000.

13 MR. ST. ANTOINE: Correct. So we have  
14 Dr. Beyer in this case, in his benchmark selection,  
15 doing something that he didn't do in linerboard and  
16 didn't do in other cases, he came up with his own  
17 timetable for when the conduct began. And what is  
18 that timetable? I want to turn to another slide, Your  
19 Honor.

20 THE COURT: Is it --

21 MR. ST. ANTOINE: It's 14. 14 of my  
22 slide deck.

23 THE COURT: All right.

24 MR. ST. ANTOINE: So we talk about how  
25 he rejects the plaintiff's alleged date, and then he's

1 asked, and I will play a video clip for Your Honor,  
2 when Dr. Beyer believes that the conduct, the  
3 actionable conduct began. And he, at the video clip  
4 will reflect, admits to no evidence of cooperative  
5 conduct before November 1st, 2000.

6 And can we play clip 37?

7 (Video played)

8 MR. ST. ANTOINE: So that's the first  
9 date on --

10 THE COURT: But I don't really see the  
11 point. The evidence presented by defendant -- by  
12 plaintiff in this proceeding, is that the -- and in  
13 the remand briefs is that the cooperative behavior  
14 began in November of 2000. And Beyer has to take the  
15 evidence as he finds it, as it's presented to him. I  
16 don't -- I really don't see the issue.

17 I see the issue if the collusion, if  
18 there was evidence of collusion beginning in January  
19 of 2000, because that would wipe out the use of OCV as  
20 a benchmark. But there is no evidence of collusion of  
21 which I'm aware between January 1st of 2000 and  
22 November 1st, 2nd or 3rd -- I guess it's the 4th of  
23 2000; isn't that correct?

24 MR. ST. ANTOINE: Your Honor, that is  
25 absolutely correct. What Your Honor has identified is

1 the first -- what I'll call first of two problems. So  
2 the first is the problem of dealing with operation  
3 create value, legitimizing that as a benchmark and  
4 he's got to deal with that by moving away from the  
5 plaintiff's earlier allegations.

6 THE COURT: But he's focused on the  
7 evidence not the allegation.

8 MR. ST. ANTOINE: All right. Let's  
9 take him at his word on that issue. But what he has  
10 done, is he's moved on his own, which is something  
11 experts typically do not do. So he has looked at the  
12 evidence, and he's decided that November 1 is a begin  
13 date.

14 THE COURT: He has to find a benchmark  
15 that's free of collusion. He looked at the evidence  
16 and concluded that albeit for a very short time, OCV  
17 was free of collusion, and the short time is from the  
18 time it incepted, I guess initial discussions were, I  
19 have a chart, but so many documents in the case, I  
20 think it was April of 1999; is that correct? Until it  
21 was implemented and after implementation through  
22 November of 2000, there was no evidence of collusion.

23 And based on that evidence, he opts to  
24 use OCV as a benchmark. And what you're saying is  
25 he's changed the start date of the conspiracy? The



1 January 1st, 2000 quote start date is the allegation  
2 in the consolidated amended complaint, and if that was  
3 the only evidence of conspiracy, I would not be  
4 finding any collusive conduct at all.

5 MR. ST. ANTOINE: So --

6 THE COURT: The allegation standing  
7 alone is not enough. So I really don't get the point,  
8 that's the point of this comment.

9 MR. ST. ANTOINE: So there's two  
10 points, Your Honor, and I'll get to the second in a  
11 moment. But the first point is that Dr. Beyer in this  
12 case, unlike other cases, is stepping into the realm  
13 of deciding when the conspiratorial conduct began. He  
14 is taking on that burden, which is not a burden that  
15 experts on impact and damages normally assume.

16 That is not something that experts --  
17 they take the timing and the existence of the  
18 conspiracy as a given.

19 THE COURT: Well, what he's doing is  
20 finding a benchmark period, which in his opinion, is  
21 free of collusion.

22 MR. ST. ANTOINE: The second half, Your  
23 Honor, and maybe this will clarify things. The second  
24 half is that window of time when the conspiracy needs  
25 to begin, so that he can both accept operation great

1 value, and at the same time, reject --

2 THE COURT: The BBLP.

3 MR. ST. ANTOINE: -- precisely is three  
4 weeks.

5 THE COURT: You're right. And if the  
6 evidence supports that, it seems to me that's  
7 appropriate. If there is no evidence to support that,  
8 it's inappropriate. And the fact that the  
9 consolidated amended complaint identifies at least by  
10 January 1st, 2000 as the start date is of no legal  
11 significance. That's where I am now.

12 MR. ST. ANTOINE: So now we're in a  
13 much different case than any other case that Dr. Beyer  
14 has cited. He has now created a three week window of  
15 time when his model works, according to him, or it  
16 doesn't work.

17 Now, what happens if the jury comes  
18 back and finds that the evidence in the minds of the  
19 jury is that the conspiracy between Ortho and Immucor  
20 began on January 1, 2001. We now have a case in which  
21 Dr. Beyer, his methodology, the basis for his  
22 selection of a benchmark is gone. That is --

23 THE COURT: I think his benchmark would  
24 still be appropriate. There's no evidence of  
25 collusion during his benchmark period. Some of his

1 other figures would be thrown off, at least for the  
2 year 2000.

3 MR. ST. ANTOINE: The point is, even  
4 Dr. Beyer acknowledges that if there was no  
5 conspiratorial conduct or cooperative conduct prior to  
6 November 21st, he acknowledges that he would have to  
7 reconsider the exclusion of the blood bank leadership  
8 pricing as an appropriate duopoly price benchmark.  
9 And there's a clip, I would like to show you where he  
10 makes this acknowledgement.

11 And if we could play clip 45.

12 (Video played)

13 MR. ST. ANTOINE: So Dr. Beyer is  
14 acknowledging that, of course, you would have to  
15 reevaluate the benchmark for lawful duopoly pricing if  
16 there wasn't a finding of conspiratorial conduct  
17 between January -- incepting between November 1, 2000  
18 and November 21, the date I gave him, 2000.

19 THE COURT: Well, under those  
20 circumstances, Mr. St. Antoine, two things occur to  
21 me. Number one, then there might be a basis for two  
22 benchmarks, the benchmark selected by Dr. Beyer, and a  
23 benchmark based on the non-conspiratorial adoption of  
24 the blood black leadership program. And he would have  
25 to recalculate the but for world starting from a

1 different date, starting from the time of the  
2 conspiratorial conduct.

3 MR. ST. ANTOINE: He would have under  
4 those -- under that scenario, you would have two price  
5 plans.

6 THE COURT: And he can pick one.

7 MR. ST. ANTOINE: No, he can't.  
8 Because he --

9 THE COURT: What if he picked one that  
10 he thinks is reliable, he'd have to identify it and --

11 MR. ST. ANTOINE: Because they both,  
12 Your Honor, they both at that point, they both fit Dr.  
13 Beyer's criteria for a but for benchmark.

14 THE COURT: Well, isn't the answer to  
15 your question, though, based on the evidence presented  
16 to Dr. Beyer and the evidence presented to the Court  
17 today, there is simply no evidence of conspiratorial  
18 or cartel conduct before November -- I think the date  
19 is 4th, 2000. That's an issue, and it's an issue in  
20 every case.

21 If an expert opines, and the expert's  
22 opinion is based on evidence, which the jury doesn't  
23 find, and that's the way we charge the jury with  
24 respect to evaluation of expert testimony, then the  
25 jury is to disregard the testimony. But that's not an

1 issue that I can address and resolve today. Unless  
2 there's evidence of conspiratorial or cartel conduct -  
3 -

4 MR. ST. ANTOINE: But even if we assume  
5 --

6 THE COURT: -- that begins not  
7 November, but later. What you're saying is, assume,  
8 Judge, that a jury finds no evidence of unlawful  
9 conspiratorial conduct in November of 2000, and  
10 further assume that that unlawful conduct doesn't  
11 begin until January 1st of 2001. What then? Well,  
12 the what then is how we resolve it at trial, not at a  
13 hearing addressing class certification.

14 MR. ST. ANTOINE: Your Honor,  
15 respectfully, that's where I would disagree because  
16 it's the plaintiff's burden to demonstrate that they  
17 have reliable common proof on impact and damages. And  
18 in that scenario, you would have a jury finding a  
19 conspiracy but you would have no basis to conclude  
20 that there is a methodology of class Y proof on these  
21 separate essential elements of impact and damages.

22 THE COURT: Well then I might decertify  
23 the class.

24 MR. ST. ANTOINE: But that, Your Honor,  
25 is letting a case go forward all the way to a jury

1 trial without knowing whether or not the plaintiffs  
2 are going to be capable of proving anti-trust impact  
3 or damages.

4 THE COURT: Well, the plaintiffs say  
5 under all the evidence you've presented and discovery  
6 is complete, under all the evidence, there is no  
7 evidence of conspiratorial conduct other than the  
8 evidence between -- of the contacts and much of that  
9 was summarized by Mr. Corrigan today between I think  
10 all of those dates were in November of 2000.

11 You're conjuring up a what if the jury  
12 found no such evidence.

13 MR. ST. ANTOINE: It's actually, Your  
14 Honor, it's not a hypothetical because much of the  
15 conduct that the plaintiffs have presented in support  
16 of class certification as well as in other papers  
17 submitted at court, concerns conduct after November  
18 21st.

19 Plaintiffs, to my knowledge, has never  
20 taken the position that they're not going to submit  
21 evidence of conduct on November 21st or thereafter.  
22 In fact, today --

23 THE COURT: But that doesn't change the  
24 analysis.

25 MR. ST. ANTOINE: It does change the

1 analysis. Because Dr. Beyer recognizes that if  
2 there's no conduct before November 21st, he can't  
3 knock out blood bank leadership program as a  
4 benchmark.

5 THE COURT: No, the evidence on which  
6 he relies is the evidence summarized by the plaintiffs  
7 today, of collusive conduct in early November of 2000.

8 MR. ST. ANTOINE: But there is an  
9 important distinction, Your Honor. There's the  
10 evidence that Dr. Beyer, because it's his benchmark,  
11 he's the one selecting it, he's been proffered as the  
12 expert, and the evidence that Mr. Corrigan presented  
13 to this Court --

14 THE COURT: But that's the same  
15 evidence that was presented to Beyer.

16 MR. ST. ANTOINE: But not when asked,  
17 you know, what is he relying upon. He's relying upon  
18 -- his conclusions drawn from the evidence between  
19 November 1st and November 21st. And let me show a few  
20 more clips, because this is an important point. And  
21 there's two points to be drawn from this.

22 He's actually not opining on when the  
23 conspiracy began. He's talking about cooperative  
24 conduct between those two dates, and I want to show a  
25 couple of clips.

1 THE COURT: Well, isn't what he's  
2 doing, an effort on his part, to find a period of time  
3 during which there was no collusive conduct in order  
4 to come up with a benchmark against which to compare  
5 the but for prices?

6 MR. ST. ANTOINE: So, Your Honor, there  
7 is --

8 THE COURT: Isn't that right? Isn't  
9 that what he was doing?

10 MR. ST. ANTOINE: He's trying to come  
11 up -- he's come up with a three week period of time in  
12 order to make a selection --

13 THE COURT: That's the conspiracy.  
14 He's come up with an end to the non-conspiratorial  
15 conduct of Ortho.

16 MR. ST. ANTOINE: And --

17 THE COURT: And he's using everything  
18 that precedes the beginning of the conspiratorial  
19 conduct, and follows the creation of the duopoly as  
20 his benchmark period. Isn't that what he's doing?

21 MR. ST. ANTOINE: But he is also  
22 acknowledging as he did in that clip, that if the  
23 evidence leads a trier of fact to regard November 21st  
24 as the inception of the alleged conspiracy, then his  
25 model doesn't work, which is an extraordinary thing



1 for an economist to do.

2 THE COURT: But the evidence on which  
3 he relied tells him and it tells me more importantly,  
4 that the conspiratorial conduct began at the time the  
5 plaintiffs are alleging it began.

6 MR. ST. ANTOINE: But let's put aside  
7 for a moment, Your Honor, the November 1st date. That  
8 is his beginning date, and let's focus on the November  
9 21st date. The date in which he says, that's the end  
10 date for when the --

11 THE COURT: Well, there's no -- well,  
12 that's when it was -- the conspiratorial conduct  
13 resulted in the adoption of these high prices, that's  
14 what the plaintiffs are arguing. I don't think  
15 they're arguing that the conspiracy ended.

16 MR. ST. ANTOINE: No, no, no,  
17 absolutely, Your Honor. Let me clarify, Your Honor,  
18 because it's important.

19 What Dr. Beyer is saying is in order to  
20 disqualify the other price plan, BBLP, he's  
21 acknowledging that the conspiratorial conduct had to  
22 begin before November 21st. Otherwise, it would meet  
23 the same criteria as operation create value.

24 THE COURT: He has to -- he has found  
25 that there's evidence that the blood bank leadership

1 program was the product of conspiratorial conduct that  
2 began at the first of the meetings of the association  
3 on November 4th. That's what causes him to disqualify  
4 or to reject the blood bank leadership program as a  
5 benchmark.

6 MR. ST. ANTOINE: Actually it's -- he  
7 actually hasn't done exactly that, Your Honor.  
8 Because -- and can I play one, it's not a long clip?

9 THE COURT: Absolutely.

10 MR. ST. ANTOINE: Okay.

11 THE COURT: But I'm not -- as concerned  
12 as I am about costs, I'm not concerned about this. I  
13 don't see your point. I don't think --

14 MR. ST. ANTOINE: Your Honor, I  
15 understand that the Court's sort of identification of  
16 the strengths of the arguments, I believe that this is  
17 an equally important point, and I'm afraid that it's  
18 my failure to articulate it clearly that is the reason  
19 it's --

20 THE COURT: Well, we're going to recess  
21 for lunch soon, you can regroup, and --

22 MR. ST. ANTOINE: Okay.

23 THE COURT: -- can present it again.  
24 I'm not rushing through this. I'll give you a chance  
25 to argue. But I do not see the difference between

1 Beyer in linerboard and Beyer in this case that you're  
2 focused on. I do not think this is -- based on what  
3 you've argued so far, outrageous conduct on the part  
4 of Dr. Beyer.

5 MR. ST. ANTOINE: Well, let me -- can  
6 we jump back to the linerboard clip, and I don't know  
7 what Your Honor's timetable is for lunch.

8 THE COURT: Maybe we ought to lunch  
9 before we jump back.

10 MR. ST. ANTOINE: Okay.

11 THE COURT: It's a quarter of, we'll be  
12 in recess until 1:30.

13 MR. ST. ANTOINE: Thank you, Your  
14 Honor.

15 THE CLERK: All rise.

16 THE COURT: We're in recess.

17 (Recessed at 12:42 p.m.; reconvened at 1:45 p.m.)

18 THE CLERK: All rise.

19 THE COURT: Good afternoon, everyone,  
20 please be seated.

21 Mr. St. Antoine, you may continue.

22 MR. ST. ANTOINE: Thank you, Your  
23 Honor.

24 (Pause)

25 MR. ST. ANTOINE: Your Honor, before

1 getting back to the three week window of time between  
2 November 1st and November 21st, I want to explain and  
3 argue about the importance of this issue in terms of  
4 the ultimate opinion on anti-trust impact and damages.

5 And the point is this, if Dr. Beyer is  
6 going to use a business plan for price as his  
7 benchmark for but for pricing, and if the evidence  
8 leads to the conclusion that the blood bank leadership  
9 program price is during a non-conspiratorial time  
10 period, then Dr. Beyer has no basis to opine that  
11 there was any anti-trust impact for any class members  
12 or any damages.

13 THE COURT: Two comments on that.  
14 Number one, there is no such evidence in the case at  
15 this time, and I can only decide what I've been asked  
16 to decide, based on the evidence presented, number  
17 one.

18 And number two, it seems to me, and I  
19 looked at some cases over the noon recess that what  
20 we're talking about is referred to in the cases as  
21 benchmark shopping. And it's an argument that can be  
22 made, but here there's no evidence of any improper  
23 benchmark shopping or indeed other than the issues  
24 that we've addressed already, and there might be some  
25 others, I don't see what you're talking about as an

1 issue at all.

2 MR. ST. ANTOINE: Well, let me --

3 THE COURT: There is no evidence of  
4 conspiratorial -- of -- well, the only evidence of  
5 cartel or conspiratorial conduct presented to me is  
6 the evidence in what occurred between November 1st or  
7 4th, 2000 and November 20th or 21st, 2000, period.  
8 Isn't that the answer?

9 MR. ST. ANTOINE: Well, let's start  
10 with that.

11 THE COURT: All right.

12 MR. ST. ANTOINE: And there's a -- in  
13 terms of the record, one of the issues that Dr. Beyer  
14 has to deal with is that blood bank leadership pricing  
15 is reflected in September and October business plans.

16 THE COURT: But it was not distributed.  
17 There was some distribution to some few customers of  
18 Ortho, not all Ortho customers in the period before  
19 November 21st, but the evidence is that until November  
20 21st when Ortho and Immucor had coordinated their  
21 pricing, it was not until then or after that date that  
22 the blood bank leadership program was fully  
23 implemented and the new prices went out to all Ortho  
24 and Immucor customers.

25 MR. ST. ANTOINE: Well, two follow-ups

1 on that, Your Honor. First --

2 THE COURT: Is that a correct statement  
3 of the facts on which the plaintiffs rely?

4 MR. ST. ANTOINE: Not quite, Your  
5 Honor.

6 One, even Dr. Beyer recognizes that in  
7 order for a plan to be implemented, you don't have to  
8 send out an invoice to a customer for an actual  
9 purchase. In his testimony, he references  
10 communication of the pricing to customers, and there  
11 was evidence, there is evidence in the record,  
12 including the September and October plans that Ortho,  
13 prior to November 1st, had met with customers, and  
14 explained to them that they were going to receive  
15 price increases.

16 THE COURT: I said that. There is  
17 evidence that Ortho distributed the price list to some  
18 customers.

19 MR. ST. ANTOINE: And although  
20 plaintiffs referred to nine pilot customers, actually  
21 the price list that went out in November was to a  
22 significant number of customers. It included nine  
23 pilot customers, but it also included 138 distributor  
24 accounts, and it also included 180 federal government  
25 accounts. This was not a trial balloon. This was the

1 implementation of an adopted price plan by Ortho.

2 The other problem, Your Honor, dates to  
3 the foundation for his distinction. Dr. Beyer -- I  
4 want to show Your Honor some testimony about what Dr.  
5 Beyer believes took place in November. And the first  
6 clip I want to show you, Your Honor, is about his  
7 general view on a conspiracy, and this is clip 43.

8 THE COURT: 23?

9 MR. ST. ANTOINE: 43, it's his hearing  
10 testimony. We have a clip of that.

11 (Video played)

12 MR. ST. ANTOINE: So, Your Honor, Dr.  
13 Beyer isn't identifying anything specific that he, and  
14 it's his opinion regards as definitive cartel  
15 behavior.

16 THE COURT: Does that matter? Doesn't  
17 what matters -- well, no, let me put it this way.  
18 Isn't what matters whether or not there's evidence of  
19 collusion during the benchmark period he has selected,  
20 the OCV benchmark period? That it seems to me  
21 matters. And if Beyers says there is or is not  
22 evidence of collusion and that's an important issue,  
23 it's what the evidence shows, it's not what Beyer  
24 thinks.

25 If there was evidence of collusion

1 earlier, and evidence that tainted the OCV, even if  
2 Beyer concluded that the OCV was the product of non-  
3 collusive behavior by Ortho, if he thought that, and  
4 the evidence was to the contrary, his opinion would  
5 not be reliable on this issue.

6 So it's not what Beyer thinks about the  
7 collusive conduct, it's what really is.

8 MR. ST. ANTOINE: But he -- but in  
9 order to do two things, which he needs to do to opine  
10 on impact and damages, he not only needs to qualify  
11 under his own criteria and it's his criteria,  
12 operation great value, but he also has to disqualify  
13 the blood bank leadership program under his own  
14 criteria.

15 THE COURT: He's done that.

16 MR. ST. ANTOINE: He needs his own  
17 factual understanding, and he has testified it's his  
18 analysis of the timing of the conspiracy that is  
19 drawing him to accept one price plan and reject  
20 another.

21 THE COURT: Yes. And it's the evidence  
22 on that score, not what he thinks. He might think  
23 anything.

24 MR. ST. ANTOINE: But if the --

25 THE COURT: But if the evidence is to



1 the contrary, his opinion on that score, on that issue  
2 is going to be rejected.

3 MR. ST. ANTOINE: And it should be  
4 rejected now --

5 THE COURT: But --

6 MR. ST. ANTOINE: -- because when you  
7 ask Dr. Beyer, what are you pointing to, to accept  
8 operation great value and reject blood bank leadership  
9 program, he's not pointing to anything specific, and  
10 he's not even regarding the activities of --

11 THE COURT: Oh, he's pointing to the  
12 collusive conduct, he describes it in his testimony.

13 MR. ST. ANTOINE: Well, let me play you  
14 one -- if I may, Your Honor --

15 THE COURT: But what -- isn't what  
16 matters, what the evidence shows? Again, I don't want  
17 to sound like a broken record, but if Beyer thinks the  
18 conspiracy started later or earlier, and the evidence  
19 is to the contrary --

20 MR. ST. ANTOINE: But he has to provide  
21 a foundation for opining on anti-trust impact at the  
22 class certification stage.

23 THE COURT: Well, he has to --

24 MR. ST. ANTOINE: He needs to --

25 THE COURT: -- express an opinion.

1 MR. ST. ANTOINE: He can't simply in a  
2 conclusory way say, this plan is lawful and this plan  
3 is unlawful. He has to explain why he thinks --

4 THE COURT: Well, he said it.

5 MR. ST. ANTOINE: Only in the most  
6 conclusory way has he said this plan is plausibly  
7 independent, and this plan is plausibly the subject of  
8 cooperative behavior.

9 THE COURT: Well, I don't think so. I  
10 think the cites to his -- and I'm just looking for  
11 them, the OCV reliability, I don't know that they've  
12 talked about the -- specifically about the blood bank  
13 leadership program unreliability, but I think the  
14 reason that --

15 MR. ST. ANTOINE: Can I play another  
16 clip, Your Honor, on this very point?

17 THE COURT: Yes. But it seems to me,  
18 and we disagree, that it's the evidence that trumps,  
19 and if there's no evidence of collusion, then yes,  
20 you've got a point; no evidence of collusion then  
21 you've got a point, but there's evidence of collusion,  
22 and the evidence of collusion before me occurred in  
23 November, some time between -- I don't want to keep  
24 repeating those dates --

25 MR. ST. ANTOINE: Understood, Your

1 Honor.

2 THE COURT: -- in November of 2000.

3 MR. ST. ANTOINE: But it is Dr. Beyer  
4 who's been charged with selecting an appropriate  
5 benchmark. And he's the one that has come up with a  
6 criteria, and beyond the most conclusory statements  
7 that one was the subject of independent action, and  
8 one was the subject of cooperative behavior, he has  
9 not provided the foundation for ruling out the blood  
10 bank leadership pricing.

11 If I could play just one more short  
12 clip on how he describes the distinction in those  
13 conclusory terms.

14 THE COURT: All right. Go ahead.

15 MR. ST. ANTOINE: Yes, clip 42.

16 (Video played)

17 MR. ST. ANTOINE: All Dr. Beyer --

18 THE COURT: Excuse me.

19 MR. ST. ANTOINE: Yes.

20 THE COURT: Yes, Mr. Corrigan?

21 MR. CORRIGAN: Your Honor, I just want  
22 to make a point, Dr. Beyer -- just for the Court's  
23 benefit, in paragraph 98 in his original report and  
24 paragraph 51 of his reply report, he does detail the  
25 evidence, some of which the Court saw earlier today,

1 makes this exact point, paragraph 98 of his original  
2 report and 51 of his reply report.

3 (Pause)

4 THE COURT: Well, I'm not even certain.  
5 I've been looking at slide 3 of the July 22nd slides  
6 presented by the plaintiffs. And there he explains  
7 why he thinks OCV is a reliable benchmark. He doesn't  
8 talk in that document about why the blood bank  
9 leadership program is not reliable.

10 MR. ST. ANTOINE: Your Honor --

11 THE COURT: But again, I think it's  
12 what the evidence shows. And if -- you apparently  
13 think that Beyer has to say it, and Mr. Corrigan has  
14 said Beyer does say it, these two paragraphs of his  
15 reports --

16 MR. ST. ANTOINE: At his hearing  
17 testimony, Your Honor, we showed you a clip. The  
18 other thing that we asked him about was, you heard Mr.  
19 Corrigan played a fairly long clip about the  
20 announcement of a dramatic price increase at the AABB  
21 meeting.

22 It's important to keep in mind, this is  
23 a trade association meeting attended by customers and  
24 vendors. It isn't just a meeting between competitors.  
25 And in fact, it is correct that Ed Gallup, the

1 President of Immucor testified, conflicting evidence,  
2 testified that there was an announcement of a -- that  
3 Ortho was going to have a dramatic price increase.

4 So I did bring up since that's  
5 something that plaintiffs have pointed to, I did bring  
6 that up at the hearing, testimony with Dr. Beyer. And  
7 I think it's important to hear it, since it's him,  
8 it's not the plaintiffs, it's Dr. Beyer who's  
9 selecting the benchmark.

10 I asked him about his interpretation of  
11 those events, and if I could, I'd like to play clip  
12 38. Let me make sure I have the right clip. No, it's  
13 clip 44. And it is valid -- the events on -- at the  
14 AABB meeting, and what Immucor learned or did not  
15 learn from that meeting.

16 THE COURT: And what you're saying is,  
17 it's what Beyer thinks about that meeting and not what  
18 actually happened at that meeting that controls? Is  
19 that what you're telling me?

20 MR. ST. ANTOINE: It's does he have a  
21 foundation for picking one benchmark and rejecting  
22 another. And --

23 THE COURT: Or is the question, is  
24 there a foundation for picking one benchmark and  
25 rejecting another?

1 MR. ST. ANTOINE: But he is the one,  
2 Your Honor, that is opining on whether or not this is  
3 a capable method of common proof of --

4 THE COURT: He might reject a benchmark  
5 for all the wrong reasons. If he accepts a benchmark  
6 for all the wrong reasons, the same thing applies, as  
7 long as the benchmark is acceptable or rejected for  
8 reasons the Court finds are supported by the evidence,  
9 doesn't that trump what you are arguing?

10 MR. ST. ANTOINE: Well, it is the  
11 expert when -- and it's part of the Court's  
12 gatekeeping function, you evaluate what the expert  
13 relies upon, in deciding whether or not something is  
14 an appropriate benchmark or not.

15 THE COURT: Yes. But if he relies on  
16 an appropriate benchmark in the eyes of the Court for  
17 the wrong reason, if the Court says, well, that  
18 benchmark is appropriate, but he hasn't quite  
19 articulated all of the reasons or the reason the Court  
20 thinks is most significant in adopting that benchmark,  
21 are you saying I should reject the benchmark?

22 MR. ST. ANTOINE: I say if -- when  
23 asked to explain himself --

24 THE COURT: No, no, answer the question  
25 then explain it.

1 MR. ST. ANTOINE: I think the answer,  
2 if I understand the question, Your Honor, is --

3 THE COURT: The question is, I'll  
4 repeat it.

5 MR. ST. ANTOINE: Okay.

6 THE COURT: If an expert adopts a  
7 benchmark for the wrong reasons, and the Court  
8 concludes that the benchmark is an appropriate  
9 benchmark for all of the right reasons and is  
10 supported by the evidence, are you saying the Court  
11 should reject the benchmark?

12 MR. ST. ANTOINE: Yes. Because this --  
13 it's the expert's whose opinion, and based on his  
14 economic qualifications and his --

15 THE COURT: His opinion is, this is an  
16 appropriate benchmark and if the Court agrees it's an  
17 appropriate benchmark but for different reasons than  
18 articulated, you're saying the opinion should be  
19 rejected?

20 MR. ST. ANTOINE: As unreliable, yes.

21 THE COURT: I'd like a case on that  
22 tomorrow morning. I don't think you'll find one.

23 MR. ST. ANTOINE: I think what we will  
24 find is that --

25 THE COURT: No, I want a case on that

1 issue. I don't want a lot of cases, I don't want a  
2 brief, I want a case, a cite, we'll read it.

3 MR. ST. ANTOINE: Okay.

4 THE COURT: Or more than one.

5 MR. ST. ANTOINE: Your Honor, on -- we  
6 will do our best to find a case that fits within the  
7 contours of --

8 THE COURT: You've just made a  
9 statement and I disagree with you.

10 MR. ST. ANTOINE: And -- but --

11 THE COURT: But I haven't researched  
12 it. I think it's so far out that it -- you're not  
13 going to find anything. And I think what you're  
14 talking about is -- it falls generally into the  
15 category of --

16 MR. ST. ANTOINE: What we think --  
17 Ortho's position --

18 THE COURT: -- benchmark shopping, but  
19 I can't conceive of a Court saying, and I might be  
20 wrong, and you'll tell me if I am, with cases that if  
21 an expert again, I'll repeat, accepts -- adopts a  
22 benchmark, but for the reason -- wrong reasons in the  
23 eyes of the Court, and the benchmark is nevertheless  
24 an appropriate benchmark, you're saying that the Court  
25 should reject the benchmark. So we'll see.



1 MR. ST. ANTOINE: Your Honor, I want to  
2 make a -- I'll leave a point as well about Dr. Beyers,  
3 and then I'll move on, about his distinction. Because  
4 I do think this is a related but separate point. He  
5 is careful not to think about conspiracies versus non-  
6 conspiracies. He frames everything in terms of  
7 independent conduct versus cooperative conduct.

8 And as the Courts have recognized,  
9 there is a form of cooperative conduct between  
10 duopolists that is lawful. An example is price  
11 leadership. So to regard conduct as unlawful, and  
12 therefore, preclusive of an appropriate benchmark, you  
13 need to do more than simply conclude that it was  
14 cooperative conduct.

15 And the Courts have been clear about  
16 this. They recognize the concept of tacit collusion.  
17 When there's market concentration --

18 THE COURT: No, I'm trying to think of  
19 the phrase, is it conscious parallelism?

20 MR. ST. ANTOINE: That's a formulation  
21 of it. But in the context of duopolies, it's also  
22 framed in terms of tacit collusion or price  
23 leadership. It's a form of cooperative conduct where  
24 the duopolists because there's such a limited number  
25 of competitors in the marketplace, recognize their

1 inner-dependence in their own pricing decisions.

2 That's not unlawful, Your Honor.

3 THE COURT: You're right.

4 MR. ST. ANTOINE: So to say that one  
5 price plan was independent, and to say another one was  
6 cooperative is not to say that one took place or was  
7 part of a conspiracy. And that's all Dr. Beyer has  
8 said in his testimony.

9 THE COURT: Well, you're back to the  
10 same point. I think Coe is working on it by the way.  
11 He better because I think the point very simply is I  
12 articulated it, if he says the conduct was  
13 cooperative, which in your eyes, can be illegal or  
14 legal, and I conclude that the conduct was cooperative  
15 but legal, then that part of his opinion which is  
16 based on that issue goes out, regardless of what he  
17 thinks.

18 If he's reached the right conclusion  
19 for the wrong reasons, you say the opinion, the  
20 conclusion, the proper benchmark conclusion or the  
21 rejection of something as a benchmark should go out,  
22 and I disagree with you. And you're going to get me a  
23 case or two or more, I don't want a brief, I've got  
24 enough briefs, I'm surrounded by briefs, none of which  
25 I think hit the issues that I think are really

1 critical.

2 I shouldn't say that. They touch them,  
3 touch on them, but peripherally. You're going to get  
4 me just cases. I don't want to read a lot of  
5 argument, and I'll conclude, I'll decide whether what  
6 I'm saying is correct or not.

7 MR. ST. ANTOINE: Your Honor --

8 THE COURT: But right now I disagree  
9 with you.

10 MR. ST. ANTOINE: Understood.

11 THE COURT: I think it's what the  
12 evidence shows. Beyer may reach the right conclusion  
13 and the evidence supports him, I think that carries  
14 the day. And I think that's in essence what I've said  
15 in my first opinion. I look to the evidence to  
16 support, his selection, for example, and that's  
17 generally what we're talking about, OCV over the BBLP.  
18 And I concluded in the first opinion that it was  
19 reasonable.

20 MR. ST. ANTOINE: Your Honor --

21 THE COURT: And again, I fall back on  
22 the phrase benchmark shopping, I think you might be  
23 doing a little of that, but for the fact that if we  
24 take the BBPL (sic) plan out of the collusive conduct  
25 area, there's another set of issues that you haven't

1 addressed. I'll have to address those.

2 MR. ST. ANTOINE: Okay. On the -- I  
3 want to follow-up, I know we've touched upon the  
4 general use of business plans. Your Honor defalled  
5 (ph) Mr. Corrigan's points. It's not the position of  
6 Ortho that experts can't make use of business plans in  
7 developing their opinions.

8 What our position is, is that they  
9 cannot take from the business plans ultimate decisions  
10 or projections, including price plans, without their  
11 own independent verification. And there's been  
12 citation to the Third Circuit's Meritor case and it is  
13 true that the Third Circuit's not saying that experts  
14 cannot make use of business plans in appropriate  
15 context.

16 But to simply take a company's  
17 projections, and that's essentially what Dr. Beyer has  
18 done has taken a statement from a business plan at 25  
19 percent -- prices should go up by 25 percent for two  
20 years, and adopted that as his own without doing his  
21 own independent economic investigation.

22 He's essentially reading from a  
23 document and that, as an expert's work in that regard,  
24 isn't assisting the trier of fact. He's not acting as  
25 an expert in that sense.

1                   THE COURT: He's using that business  
2 plan, although I was surprised by his testimony that  
3 it wasn't a business plan, but he's using that  
4 testimony as the basis for his benchmark  
5 determinations.

6                   I don't know what kind of research  
7 you'd have to do. He's taking Ortho -- well, we'll  
8 call it a business plan, and using it. That's what he  
9 says he's doing, and I'll have to decide whether he  
10 is. But he says, so as in Ortho, I considered  
11 corporate project increase not a document, not a  
12 business plan, Ortho decided to do it and it did  
13 implement this plan and he used it, just the document.

14                  MR. ST. ANTOINE: I think the  
15 distinction, Your Honor, is just like in the Meritor  
16 case where the expert who was excluded took the  
17 company's projections and used them as his own without  
18 doing independent verification. Dr. Beyer is taking a  
19 price percentage and using it as his own without doing  
20 his own independent economic investigation.

21                  If he had taken data from a business  
22 plan and run his own empirical economic analysis, it  
23 would be a different story.

24                  THE COURT: He did that based on the  
25 business plan. I don't understand what empirical

1 analysis you say he should have done with respect to  
2 the Ortho -- and I'll call it a business plan, it  
3 appears to be that.

4 MR. ST. ANTOINE: Well, he's taken the  
5 25 percent, and he's taken that without increasing it  
6 or decreasing it, or evaluating whether that should be  
7 the right percentage.

8 THE COURT: But that's what Ortho said  
9 it should be, and that's what he's relying on.

10 MR. ST. ANTOINE: But that's simply  
11 reading from a document and not doing your own  
12 independent economic analysis.

13 THE COURT: What kind of economic  
14 analysis do you say he should have done to determine  
15 what Ortho planned to do according to the OCV?

16 MR. ST. ANTOINE: Well, we've -- I  
17 don't want to retread old ground, Your Honor, but on --  
18 -- there were information about, you know, costs that  
19 are actual market data, and --

20 THE COURT: You're talking about  
21 Ortho's costs.

22 MR. ST. ANTOINE: You could take  
23 Ortho's costs, you could take Immucor's, you could  
24 take somebody's cost information --

25 THE COURT: I must be missing this

1 point too. He's using that document as Ortho's  
2 business plan in a non-collusive atmosphere. And he's  
3 determining -- he has determined that that will be his  
4 benchmark. A business plan adopted in a non-collusive  
5 atmosphere.

6 MR. ST. ANTOINE: But he's not taking  
7 the -- he's not taking that number and subjecting it  
8 to his own evaluation about in the years subsequent to  
9 that plan, would that be a good estimate of but for  
10 pricing.

11 THE COURT: Oh, it might be a terrible  
12 estimate. But it's Ortho's estimate, and he's relying  
13 on it.

14 MR. ST. ANTOINE: In January of 2000.  
15 And he's taking that in January of 2000, their plan  
16 without doing economic analysis, he's simply using  
17 that number to say what they would have priced for  
18 2001 and 2002, and for five years. And he hasn't done  
19 his own economic analysis to decide whether that's  
20 what a company would likely do in a non-conspiratorial  
21 environment.

22 THE COURT: All right.

23 MR. ST. ANTOINE: Thank you, Your  
24 Honor.

25 THE COURT: Thank you. Have you

1 finished all of the points? Let me get that.

2 MR. ST. ANTOINE: You're right, Your  
3 Honor, there is --

4 THE COURT: Let me go get that.

5 MR. ST. ANTOINE: There's one more  
6 point.

7 THE COURT: The issues that I think  
8 you're addressing in bucket 2 are the timing of the  
9 conspiracy, I think you've covered that, selection of  
10 OCV over BBLP, and I think you've addressed that. And  
11 the shift of the data of conspiracy, I guess you have.

12 MR. ST. ANTOINE: Yeah, I --

13 THE COURT: And the but for pricing  
14 based on OCV.

15 MR. ST. ANTOINE: The one issue that I  
16 don't know if it came up earlier in the hearing, it's  
17 on the shift. I'll be brief on that, Your Honor.

18 The point there is that although he's  
19 adopted operation create value as his benchmark, the  
20 thing that he's hanging his hat on, he actually hasn't  
21 applied that on -- consistently with what the plan was  
22 in January of 2000. The plan in January of 2000 was a  
23 25 percent price increase --

24 THE COURT: For two years.

25 MR. ST. ANTOINE: -- for two years.



1                   Now, Mr. Corrigan is correct in  
2 pointing out that there were contracts on -- that may  
3 have interfered with the full implementation. But  
4 once you recognize that reality, he is now departing  
5 from what the plan was. So if the plan was a 25  
6 percent price increase in those two years, that's not  
7 in fact, what Dr. Beyer is doing. He's not treating  
8 that plan as an accurate or a complete analysis of  
9 what pricing would be in subsequent years. Because  
10 price plans change. And once you factor in subsequent  
11 developments, like the fact that contracts got in the  
12 way, you're losing the integrity of the benchmark that  
13 you, yourself, are pointing to for the foundation of  
14 your model.

15                   Price plans change, and that's our --  
16 essentially that's our larger point, is that Ortho  
17 recognized in the course of 2000 the difficulties of  
18 rolling out a price plan.

19                   THE COURT: Well, he says the price  
20 plan changed either because of continuing contracts or  
21 for other reasons, and says, the implementation of the  
22 plan did not actually take effect until 2001. Is that  
23 the argument you're making? And then he takes -- then  
24 he adds that, and the evidence is the evidence that  
25 Mr. Corrigan addressed this morning that to stay the

1 course statement in the September 15th, 2000 document,  
2 coupled with the statement in that same Ortho document  
3 that the choice is one dramatic or large, I've  
4 forgotten the word, price increase versus \$25,000  
5 price increases for five years, he says those are  
6 changes in the plans, which he's utilized.

7 His benchmark includes an effective  
8 start date of the implementation of the plan, OCV plan  
9 of January 1st, 2000. And certainly as we've argued,  
10 as you've argued, and as Corrigan has argued, the plan  
11 started out as a two year plan, but it became a five  
12 year plan. So he's done that.

13 MR. ST. ANTOINE: What he's not doing,  
14 Your Honor, is having identified the plan in 2000 as a  
15 good model for what price increases should be.

16 THE COURT: Oh, I don't think he has to  
17 do a good model as to what price increases should be.  
18 It's what Ortho said, their price increases would be.  
19 Isn't that what the plan is all about?

20 MR. ST. ANTOINE: He is using -- he's  
21 pointing to this January 2000 plan as a benchmark for  
22 predicting what in a non-conspiratorial world price  
23 increases would be. But then he's making his own  
24 adjustments from that plan.

25 So he, in fact, not being entirely

1 faithful to the very plan that is his benchmark.

2 THE COURT: Well, that's one of the  
3 issues in the case. He says the implementation of the  
4 plan was changed, it was really 2001 in which the plan  
5 was implemented. And then he says, again, I don't  
6 want to sound like a broken record, that the -- and  
7 we've got some other issues to address, so we don't  
8 want to beat a dead horse, but then he says that the  
9 plan was extended from two years to five years, based  
10 on the presentation on September 15th, 2000.

11 MR. ST. ANTOINE: And, Your Honor, one  
12 follow-up point because I -- you know, I know I may be  
13 kind of beating a dead horse is, the plan that he's  
14 referencing is only changed to five years, as we've  
15 discussed at length, was the BBLP plan. That was the  
16 planning document that where he talks about the five  
17 plus years.

18 THE COURT: Corrigan argues that  
19 although it was in the BBLP plan description, the  
20 choice was dramatic price increase which was the BBLP  
21 price increase versus the five years at \$25,000 a  
22 year, which Corrigan argues, and I think there's  
23 support for this, that was reference to the OCV plan.  
24 That coupled with stay the course, the statement in  
25 the same document, Corrigan argues is the basis, at

1 least the major basis for the conclusion that the OCV  
2 plan was extended from a two year plan to a five year  
3 plan.

4 MR. ST. ANTOINE: Right, Your Honor.

5 THE COURT: That's what Corrigan says.

6 MR. ST. ANTOINE: That's what he says,  
7 and he's pointing to an Ortho document to make that  
8 point.

9 THE COURT: You're right. But the  
10 document, and as I articulate this, I know -- I really  
11 don't like to well hammer a lawyer appearing before  
12 me. I'm sort of reminded of something that then Judge  
13 Bechtel did to me when I did something that he didn't  
14 quite want me to do. He made me stand there in front  
15 of him in this building, not in this courtroom, and he  
16 proceeded to hammer me, and I don't want to do that to  
17 you, but let me just end this argument on -- this part  
18 of the argument on this note.

19 It seems to me a strong argument can be  
20 made that the document to which you refer, the  
21 September 15th document, 2000 document which is a BBLP  
22 document, when it references, with this choice we have  
23 to make is a dramatic price increase, a single price  
24 increase, that part -- that statement refers to the  
25 BBPL (sic) price increase versus five years at \$25,000

1 a year -- 25 percent a year, pardon me. That refers  
2 to, although it's in the BBPL document. That refers  
3 to OCV. I think there's -- that argument has been  
4 made, there's evidence to support it, I'll have to  
5 determine how significant that is. I think it's  
6 pretty significant. But I don't think anything else  
7 needs to be said on this point.

8 MR. ST. ANTOINE: Thank you, Your  
9 Honor.

10 THE COURT: Have we covered all of the  
11 bucket 2 points?

12 MR. ST. ANTOINE: I believe so.

13 THE COURT: Bucket 3, as I look at it,  
14 is averaging, the averaging issue. It's also and I  
15 identified it as my point 3, and it's also post-2005.  
16 We haven't really talked much about -- well, we  
17 haven't said anything about RhoGAM as a yard stick  
18 number one. But we haven't talked about post-2005 at  
19 all, the use of the Immucor costs, and was that  
20 reasonable, particularly in view of the fact that Dr.  
21 Beyer did not use costs at all in his establishing the  
22 pre-2005 benchmark. And let's see what else we have  
23 on this issue. This might be all. No. Yes. Yes,  
24 that's it.

25 MR. CORRIGAN: Your Honor, I think what

1 I have identified as 1(b) was -- is use of Immucor's  
2 costs as a proxy for Ortho's costs, is that fair?

3 THE COURT: Yes. And I guess one --  
4 yes, yes.

5 MR. CORRIGAN: I've got 1(b) -- I have  
6 1(b) which is Immucor costs as a proxy for Ortho's  
7 costs. Frankly --

8 THE COURT: And RhoGAM, and that's part  
9 of this argument as well.

10 MR. CORRIGAN: Yes. I'm just -- yes.  
11 1(b) is that. 2 I had was the averaging issue using  
12 the one but for price.

13 THE COURT: Yes.

14 MR. CORRIGAN: And then 3, had the  
15 RhoGAM issue.

16 THE COURT: Well, did averaging apply  
17 only to the post-2005 period?

18 MR. CORRIGAN: No. No, I don't believe  
19 so.

20 THE COURT: Well, you can argue them in  
21 whatever order you think appropriate, but your 1(b)  
22 and RhoGAM cover the same period of time, the post-  
23 2005 issue.

24 MR. CORRIGAN: Your Honor, on 1(b), the  
25 sum of what I have is the fact that Ortho's costs are

1 unreliable, and we've been over that yesterday and  
2 we've been over that today. I can do some of that  
3 again. I mean, the Court actually found -- the  
4 Court's finding at page 242, note 12 of your opinion,  
5 sort of finds that was reasonable. I can read that,  
6 but otherwise --

7 THE COURT: No, let me --

8 MR. CORRIGAN: Yeah, I have a slide  
9 too.

10 THE COURT: Let me see it. What page  
11 again?

12 MR. CORRIGAN: It's 242, note 12 of  
13 your opinion, and I have it up on there on the screen  
14 now, Your Honor. It's also slide 25 of today's  
15 presentation.

16 THE COURT: Let me look at the whole  
17 thing. 242 note 12?

18 MR. CORRIGAN: Yes, sir.

19 THE COURT: Okay. "Dr. Beyer uses  
20 Immucor standard costs for both defendants, because  
21 Ortho has represented that its cost data is  
22 unreliable. Because both defendants manufactured the  
23 same products from similar raw materials, and were  
24 subject to the same regulations, Immucor's costs are a  
25 reasonable proxy for Ortho's costs. At the very

1 least, Immucor's standard costs is sufficient to give  
2 reasonable estimate of damages and nothing more is  
3 required." Well, more might be required now.

4 Although, according to you, there's a difference  
5 between damages -- well, the defense argues there's a  
6 difference between damages and anti-trust impact.

7 The reasonable impact -- the reasonable  
8 estimate comes from the --

9 MR. CORRIGAN: That's in Story  
10 Parchment.

11 THE COURT: Yes.

12 MR. CORRIGAN: It comes from Rossi in  
13 this particular instance, but it's using language  
14 that's similar to Story Parchment.

15 THE COURT: All right. What point are  
16 you making using this footnote?

17 MR. CORRIGAN: I'm just making the  
18 point that you found that this was reasonable, because  
19 Ortho -- again Ortho says their costs were unreliable,  
20 and then goes on defensive -- the offensive, and says,  
21 well, you can't use our costs, so you have no reliable  
22 cost data. I mean, it's got to be one way or the  
23 other. They can't get the benefit of their unreliable  
24 costs, but Dr. Beyer does, these two companies they  
25 manufacture very similar products. As we've seen,



1 there's a lot of information in the record on the  
2 homogenous nature of these products. They're subject  
3 to similar FDA restrictions and regulations, we have a  
4 fair -- we have a lot of evidence in the record on  
5 that point.

6 There are cross-walk documents, Your  
7 Honor, which are in the record as well, which show  
8 that there were corresponding products for each  
9 company. So while they may not have the exact same  
10 costs, there were reasonable proxy for them,  
11 particularly in light of Ortho's statements that their  
12 costs, their own costs were unreliable.

13 THE COURT: Well, I have -- I really  
14 wasn't -- well, that's an issue that has to be  
15 addressed and you've addressed it. But this issue  
16 also raises the question of the inconsistency between  
17 the models used by Dr. Beyer in the 2000 to 2005  
18 period and post-2005 period, he rejects costs in the  
19 first period, and relies on them exclusively in the  
20 second period.

21 MR. CORRIGAN: Well, I wouldn't say he  
22 rejects them. What he says is they've already been  
23 properly accounted for, in connection with the OCV.

24 THE COURT: Well, you've made that  
25 argument, but wasn't that argument at least undercut

1 by what the defense said about the standard costs,  
2 first of all actual costs were not considered at all,  
3 and standard costs were -- what was the word used in  
4 Dr. Beyer's -- no, not in Beyer's report. Standard  
5 costs were -- and I've forgotten the word.

6 When I asked you a question when you  
7 were working for me, you were much faster.

8 MR. COE: Much faster (indiscernible)  
9 Your Honor.

10 THE COURT: What's the word, standard  
11 costs were --

12 MR. COE: Frozen, Your Honor?

13 THE COURT: Yes. Was it frozen or --  
14 they were not considered.

15 MR. CORRIGAN: Well, they --

16 MR. COE: They were soon to be frozen,  
17 Your Honor, yes.

18 MR. CORRIGAN: And Beyer says, it makes  
19 perfect sense, that they're frozen because you have to  
20 keep costs constant to make an apples to apples  
21 comparison on the revenue impact of various different  
22 price increases. If you're doing --

23 THE COURT: But he's trying to  
24 determine revenue impact in the post 2005 period.

25 MR. CORRIGAN: Right.

1 THE COURT: And he's using costs as his  
2 benchmark.

3 MR. CORRIGAN: Well, what he does, he  
4 has to select an appropriate benchmark. So what he  
5 does in the first period was the most appropriate  
6 benchmark was OCV. As the Court pointed out, he had a  
7 reasonable plausible, he had good grounds for seeing  
8 the 25 percent extend five years.

9 He didn't have good grounds in his mind  
10 for doing that further, although there was some  
11 evidence in the record of that. At that point in  
12 time, he's got to select the next benchmark.

13 THE COURT: Or maybe he doesn't. Maybe  
14 there's no evidence on which to select, quote, a next  
15 benchmark.

16 MR. CORRIGAN: Well, he has to -- if  
17 there's -- he does find two, so he doesn't say this  
18 isn't the only one, he finds two.

19 THE COURT: He finds RhoGAM.

20 MR. CORRIGAN: He finds RhoGAM and he  
21 finds the costs.

22 THE COURT: We're talking now about  
23 costs.

24 MR. CORRIGAN: Yes. So his job as a  
25 economist is to specify a benchmark, and the one he

1 specifies is appropriate from 01/05. At the end of  
2 '05, he does another investigation, or it's part of  
3 the same investigation. Are there any appropriate  
4 benchmarks from this point on, and that's what he's  
5 done.

6 Now, the costs as we demonstrated I  
7 think in our briefs, he says that the costs, and the  
8 Court agrees with this in its opinion, both  
9 benchmarks, and I know I'm getting into RhoGAM a  
10 little bit, but we'll stick with costs. Both  
11 benchmarks reflect market structure, because he says  
12 that most industries, you can't just pass your costs  
13 along as they come, most industries you may have to  
14 eat some of your costs in a competitive industry.

15 Because this is a duopoly, in his  
16 benchmark, they are allowed all their cost increases.  
17 Now, that's conservative for a couple of reasons. One  
18 reason is if the costs go down, Dr. Beyer's but for  
19 world doesn't make the but for prices go down.

20 So if costs go down, they don't suffer  
21 a price increase -- they don't suffer a but for price  
22 decrease. So it takes market structure into account,  
23 and it's a conservative estimate because there's no  
24 cost decrease.

25 Now, what Dr. Bronstein said, and this

1 is an ironic point that they make, that Ortho makes.  
2 Ortho makes two points, one is they say, you really  
3 shouldn't extend these 25 percent increases more than  
4 two years. Their other point, which is directly  
5 conflicting is why would you stop after five years.

6 The Court pointed out there are a  
7 number of reasons why one would have to stop after  
8 five years.

9 THE COURT: Pointed out in --

10 MR. CORRIGAN: In your opinion, yes.

11 THE COURT: Okay.

12 MR. CORRIGAN: That it's a simplistic -  
13 - I can find the language, it's a simplistic statement  
14 for Dr. Bronstein to say, it could go on forever.  
15 There are a number of reasons why it can't go on  
16 forever. Competition is one of them. It's a novel  
17 concept in this case, but competition is one of them.

18 So the Court found that that was  
19 reasonable, I'll look for the language, but to say  
20 that -- to allow for costs to be passed on does  
21 account for market structure, and obviously the cost -  
22 - it accounts for costs specifically.

23 Now, we have an article cited in our  
24 brief which talks about this method, you know, the  
25 cost mark-up method. The article is an economic

1 article, the articles says that demand doesn't has to  
2 be specifically addressed in this method. So we have  
3 an economic article backing this methodology. And  
4 it's the most reasonable one at the time, along with  
5 the RhoGAM.

6 THE COURT: I have a footnote, my law  
7 clerk points out, footnote 11 in the opinion which  
8 addresses Dr. Bronstein's testimony.

9 MR. CORRIGAN: Yes, thank you, Your  
10 Honor.

11 Dr. Bronstein oversimplifies this.  
12 There are a number of reasons of price if a non-  
13 colluding duopolist might be lower than that obtained  
14 by a cartel. I mean, the point is basic on that.

15 THE COURT: Well, Bronstein's point is  
16 that it did not make sense for the 25 percent  
17 increases to stop after five years. In his opinion,  
18 defendants would have continued raising prices in the  
19 but for world until they reached the level of the  
20 prices actually charged.

21 MR. CORRIGAN: We see that's not always  
22 the case in the RhoGAM and we'll get to that in a  
23 minute. But just because it's a duopoly doesn't mean  
24 you can charge whatever you want whenever you want.  
25 Okay. The RhoGAM market is a good example of that.

1 It became flat. Why did it become flat? Because a  
2 duopoly there were -- no, it became flat because some  
3 of the firms in that market were competing, as opposed  
4 to the TBR market when both firms were colluding.

5 It's not just why couldn't we charge 25  
6 forever. As the Court said, that's simplistic. And  
7 the RhoGAM market shows that. So this -- the  
8 methodology adopted by users with costs takes market  
9 structure into account, it takes costs into account,  
10 as the article -- which we cite is, it doesn't have to  
11 independently take demand into account.

12 So it's a rational, reasonable  
13 benchmark based on good grounds, Your Honor. And I  
14 think Your Honor pointed out the flaws in Dr.  
15 Bronstein's criticism of it.

16 If the Court has no more questions on  
17 that, then I'd like to -- I can move on to RhoGAM now.

18 THE COURT: Because it's related, why  
19 don't we do that, and then go back to the final issue,  
20 the averaging issue.

21 MR. CORRIGAN: Okay. Let's see. I'll  
22 use a slide or two here, Your Honor.

23 Can we start with slide 29?

24 THE COURT: Are we looking at the  
25 original slides or today's?

1 MR. CORRIGAN: Today's slides, Your  
2 Honor. Now, Your Honor, I want to start with -- I was  
3 looking forward to telling you this. But I actually  
4 looked up the word congener, and it's pronounced  
5 congener.

6 THE COURT: Congener?

7 MR. CORRIGAN: Yes, not congener, but  
8 congener, okay. Now, I've seen the word twice, in  
9 that case and in the dictionary I looked it up, I see  
10 it, but it is congener, I can confirm.

11 So I start my RhoGAM presentation on  
12 this point --

13 THE COURT: With what slide now?

14 MR. CORRIGAN: 29 of today's. Okay.  
15 And I start -- where I'd like to start with the  
16 Court's opinion and the heading of this, is that Ortho  
17 disagrees with this Court's factual finding, which was  
18 untouched by the Third Circuit. We've used this form  
19 of slide several times.

20 But the Court's statement is, "Although  
21 RhoGAM and TBR are not identical, they appear on the  
22 present state of the record to be fair congeners."  
23 And that's the case, the Lofal (ph) case, which Ortho  
24 originally cited.

25 What has Ortho say on that? Well, they



1 say Rho-D is not a fair congener for blood reagents.  
2 Okay. So they just disagree with the Court's opinion.  
3 This remand is not about disagreeing with this Court's  
4 factual findings. Those remain untouched by the Third  
5 Circuit.

6 THE COURT: Well, the question is, is  
7 that a factual finding based on expert testimony, or  
8 is it independent of the expert testimony?

9 MR. CORRIGAN: Well, I want to review  
10 what the testimony was, Your Honor, and let's talk a  
11 little bit about that, okay.

12 So let's take a look at the next slide.  
13 Just go to slide 30. Okay. Now, the heading on this  
14 one, this is slide 30, Your Honor, is TBR and RhoGAM  
15 markets are fair congeners. Now, let's go to the  
16 next, it says "reasonable similarities between  
17 markets," and I have reasonable similarities in quotes  
18 there, because that is this Court quoting from another  
19 case in your opinion. And that's at page 245.

20 And you're quoting from another case  
21 that I believe Ortho cited, that would be the 11 Line  
22 (ph) case in the Fifth Circuit, reasonable similarity.

23 THE COURT: Let me find it.

24 MR. CORRIGAN: Your Honor, it is on  
25 page 245 of your opinion.

1 THE COURT: I'm there, tell me --

2 MR. CORRIGAN: Okay. Right after the  
3 local cite, you have a parenthetical there saying, "An  
4 anti-trust plaintiff who uses the yard stick method of  
5 determining lost profit bears the burden to  
6 demonstrate the reasonable similarity." Doesn't have  
7 to be exact, reasonable similarity.

8 So how did we go about --

9 THE COURT: Let me just find that.

10 MR. CORRIGAN: Sure.

11 THE COURT: This is the paragraph that  
12 begins, "To succeed"?

13 MR. CORRIGAN: Yes. If you see the 11  
14 Line cite there, Your Honor, Fifth Circuit --

15 THE COURT: Yes.

16 MR. CORRIGAN: -- there's a  
17 parenthetical after that. And you have emphasis  
18 added, "reasonable similarity."

19 THE COURT: Yes, I see that.

20 MR. CORRIGAN: Okay. So that's why I  
21 start the heading, "reasonable similarities between  
22 markets." Okay. So we review the reasonable  
23 similarities. Dr. Beyer mentioned this so we're  
24 mentioning it.

25 It's expert testimony to some extent,

1 Your Honor, but it's just the facts. Ortho was a  
2 major competitor in both industries. Okay. Next.  
3 The same Ortho executives are responsible for pricing  
4 in both industries. The next one, no substitutes for  
5 either one. Next, (indiscernible) demand; next, FDA  
6 approval as a barrier to entry, both products have to  
7 be approved by the FDA. Next, homogenous products,  
8 both are considered commodities.

9                   Next, relatively stable demand, and one  
10 is based on blood transfusions, and the other is based  
11 on pregnancies, births. And the next one, highly  
12 concentrated oligopolies. And I left this one for  
13 last because the Court expressed that it wasn't  
14 entirely persuaded on this point. I mean, why did Dr.  
15 Beyer -- is it reliable to use a three firm market as  
16 a yard stick for a two firm market.

17                   So I wanted to emphasize that one a  
18 little more because the Court had expressed concern  
19 about it. So if we could just take a look at slide  
20 31. Now, slide 31 is a pretty stark example of  
21 pricing in the duopoly as the TBR which is going up  
22 and up and up, and the green pricing is the RhoGAM  
23 pricing.

24                   Now, that is a tight oligopoly, a  
25 heavily concentrated market. That is flat. Those

1 prices are not going up 25 percent every year or  
2 anything remotely like that. So you wonder why is one  
3 way and why is the other the other way? Is it just  
4 that there's three companies in one market and two in  
5 the other? No, you have to look at the conduct.

6 What are the two firms doing in one?  
7 Well, in the RhoGAM market, you have three firms, and  
8 at least two of them are competing, that's why the  
9 line is flat. And in the TBR market, you have two  
10 firms and they are colluding, that's why the price  
11 line looks like that.

12 Now, to explain it a little bit, we  
13 have a clip from Dr. Bronstein. He helps us  
14 understand the structural definition versus the  
15 conduct. So please play the Dr. Bronstein clip. And  
16 this is slide 32, Your Honor.

17 (Video played)

18 MR. CORRIGAN: Your Honor, I just want  
19 to point out this is slide 32 just to give you a heads  
20 up.

21 THE COURT: Thank you.

22 MR. CORRIGAN: Thanks. I'm sorry, I  
23 should have mentioned it earlier.

24 (Video Played)

25 MR. CORRIGAN: He's making that point

1 exactly, Your Honor. It's not how many firms are in  
2 the market, technically, definitionally two means a  
3 duopoly, but if they were two large ones and a smaller  
4 one, the smaller one, even though now technically not  
5 a duopoly, might not have any impact on prices.

6 THE COURT: Is that the situation in  
7 RhoGAM? I know that there were three manufacturers of  
8 RhoGAM.

9 MR. CORRIGAN: It's not quite, but the  
10 effects are the same.

11 In RhoGAM you have three firms. It was  
12 originally a duopoly. One firm came in. The firm  
13 that came in, the new one, started competing heavily.  
14 One of the two, not Ortho, but the other one, Bayer,  
15 was not competing heavily. So while they weren't a  
16 smaller firm, but they were not competing much, and  
17 the effects were the same.

18 And we have some testimony that Fran  
19 Kleinbard was an Ortho employee, and we deposed her,  
20 and she showed up with a very large declaration on the  
21 suggest of RhoGAM.

22 So while Ortho in their brief says  
23 Dr. Beyer relied on the opinion or the testimony of  
24 some Ortho employee, she wasn't just any Ortho  
25 employee. They basic proposed her as a RhoGAM expert.

1                   So let's see what she had to say about  
2 the subject of what the firms in this market were  
3 doing. And this -- Your Honor, this is slide 33.

4                   (Video Played)

5                   MR. CORRIGAN: So, Your Honor, the key  
6 statements --

7                   THE COURT: Before you go on --

8                   MR. CORRIGAN: Sure.

9                   THE COURT: -- I gather that the  
10 product BayRho-D is the bare product?

11                   MR. CORRIGAN: You know, I think, Your  
12 Honor, we start -- we were calling this RhoGAM, but  
13 yes, BayRho-D is the bare product, I believe, yes.  
14 Yes. You're only competing with BayRho-D in the --  
15 yes.

16                   So the key statement she makes there,  
17 you know, one is it was not a product that Bayer  
18 really focused much on.

19                   Secondly, she said they wouldn't -- she  
20 wouldn't say they competed on price.

21                   "Would you say that BayRho-D  
22 competed against Ortho price? No. And  
23 what's the source of the  
24 competition?

25                   My experience was they didn't do much

1 at

2 all."

3 So it's not a pure two versus three,  
4 it's a two versus three where the third is not doing  
5 much.

6 THE COURT: Who is the two?

7 MR. CORRIGAN: The two is the ZLB is  
8 the new participant, and I have some information on  
9 them, which I'll show you in a second. But Bayer and  
10 Rho-D were the two, ZLB came into the market in '04.  
11 And ZLB started taking market share from Ortho, who  
12 was competing, as far as we can tell, and from Bayer  
13 who was -- really didn't do much at all. So a pure  
14 three versus two on the numbers doesn't tell the  
15 story.

16 Dr. Bronstein (ph) explains that the  
17 structure is definitional and you've got to look at  
18 the conduct. And Fran Kleinbard talks about the  
19 conduct. Bayer wasn't doing much at all -- anything  
20 at all.

21 So, Your Honor, if we could go to the  
22 next slide, it's slide 34, and that Dr. Beyer's  
23 paragraph 61 of his report where he sort of ties this  
24 all together. And what's the basis for his opinion?  
25 Well he takes a look at and he bases it partly on

1 Bronstein testimony, and partly on Kleinbard's  
2 testimony, and partly on some documents that Kleinbard  
3 -- Ms. Kleinbard provided. But the market -- you  
4 know, in the highlighted portion the market for OD was  
5 a duopoly between Ortho and Bayer Talecris. Bayer  
6 sold to Talecris sort of in the middle of this. It  
7 was the same product.

8           Until ZLB entered in '04, even after  
9 ZLB entered the market was still effectively a duopoly  
10 because Talecris did not actively compete for sales in  
11 the hospital channel, Ortho's principal focus, and  
12 made no efforts to expand its market share.

13           Bayer Talecris market share dropped  
14 from 23 percent in '03 to 18 percent in '07.  
15 Furthermore its share of the important hospital  
16 segment fell from 25 percent to 12 percent during this  
17 time. Consistent with what Ms. Kleinbard said, they  
18 weren't doing much of anything at all.

19           Dr. Bronstein confirms in his  
20 deposition that the presence of a third small firm  
21 that is capacity constrained does not have much impact  
22 on the structure of a market compared to a duopoly.

23           ZLB was an aggressive competitor  
24 successfully taking market share from Ortho. Its  
25 share rose from six percent in '05 to 17 in '07, while



1 Ortho's share fell from 70 percent to 65 percent  
2 during the same time frame.

3                   Thus the difference in pricing behavior  
4 between traditional reagents and Rho-D is not because  
5 one is a duopoly and one is a three-firm market.  
6 Rather the difference is that the market of a  
7 traditional reagents is a duopoly where joint conduct  
8 is alleged -- and not just alleged but we've seen that  
9 -- and Rho-D is effectively a duopoly characterized by  
10 price competition.

11                   So that explains the graft, Your Honor.  
12 Two of the three are competing, and in the other TVR  
13 market the other two are colluding. These are fair  
14 congeners, there's reasonable similarities, and  
15 actually I just thought of another one I forgot to  
16 put.

17                   The customers in both market are  
18 largely the same. Hospitals are a very significant  
19 piece of both markets. There's one more similarity in  
20 the analysis of whether it's a fair congener or not.

21                   And one other point, Your Honor,  
22 yesterday I think -- I'm not sure if it was  
23 Mr. St. Antoine or Mr. Coe referenced the RhoGAM  
24 market as having sort of an 83 percent margin I  
25 believe, and because they said that that was a duopoly

1 that the blood reagent should have 83, or they made a  
2 comparison that RhoGAM -- we were treating RhoGAM to -  
3 - I can't remember the exact comparison obviously.

4 But the point is that Dr. Bronstein  
5 testifies -- and I have his testimony if you need to  
6 see it -- that in the late '90s similar to his  
7 definition that it was a duopoly but one of the two  
8 was capacity constrained.

9 So, I believe in the time frame that  
10 Ortho counsel is referring to RhoGAM having an 83  
11 percent margin, at that time frame, even according to  
12 Dr. Bronstein, who was effectively a monopoly, one of  
13 the two wasn't doing much comparing.

14 So when they use that comparison that's  
15 not a comparison, that's a monopoly.

16 And, Your Honor, unless -- do you have  
17 any other questions on the RhoGAM analysis?

18 THE COURT: No.

19 MR. CORRIGAN: I'll end just with this  
20 last slide, Your Honor, and it's one more conclusion  
21 the judge made which Ortho disagrees with. This is a  
22 comment from page 235 of your opinion. In many ways  
23 this is a straightforward horizontal price fixing case  
24 brought by direct purchasers of TBR. The  
25 anticompetitive effects of horizontal price fixing are

1 obvious.

2 And what's Ortho's response to that?  
3 Plaintiffs in their memorandum on their remand echoed  
4 their oft repeated mantra that this is a  
5 straightforward horizontal price fixing case. It  
6 certainly is not. That's what they have to do, they  
7 have to disagree your factual findings, but that's not  
8 what this remand is about.

9 If the Court has no further questions,  
10 Your Honor, that's all I have.

11 THE COURT: I don't. But a word on  
12 that last comment. Factual findings that are based on  
13 the expert testimony of Dr. Beyer are not as  
14 sacrosanct as other factual findings.

15 MR. CORRIGAN: I understand that. I  
16 understand your thinking, Your Honor. And you've  
17 corrected me several times.

18 THE COURT: And of course from your  
19 perspective everything is a factual finding  
20 independent of what Dr. Beyer said.

21 MR. CORRIGAN: You've corrected me a  
22 few times on that, Your Honor.

23 Thank you.

24 THE COURT: Thank you, Mr. Corrigan.

25 Who will argue the third set of issues?

1 MR. COE: It's back to me, I'm afraid,  
2 Your Honor.

3 THE COURT: Oh, averaging.

4 MR. CORRIGAN: Oh, I'm sorry, Your  
5 Honor.

6 THE COURT: I'm sorry, Mr. Coe.

7 MR. CORRIGAN: I'm sorry, we got  
8 carried away.

9 MR. COE: I was going to cover it, Your  
10 Honor. I figured Mr. Corrigan, he said all he has to  
11 say on it.

12 MR. CORRIGAN: I appreciate that. I  
13 had RhoGAM last, but we skipped over averaging. I'm  
14 sorry.

15 THE COURT: Yes, and that's my doing.  
16 I asked you to handle the post-2005 issues at the same  
17 time.

18 MR. CORRIGAN: I can't blame a judge,  
19 Your Honor, so I'll have to take the hit on that one.

20 If I could have slide -- let's see --  
21 let's have slide 26, please. No, is that the one?  
22 Yes, 26, please.

23 Your Honor, this is about -- I think --  
24 I believe the subject is whether it's reliable to use  
25 one but for price as opposed to but for price for

1 everyone. But what Dr. Beyer has done, and I'm going  
2 to play a clip of his testimony, he estimated a but  
3 for price for each reagent for each year. So there's  
4 almost 2200 but for prices that were estimated.

5 So, I want to play a clip of Dr.  
6 Beyer's testimony, and that's slide 26, and the -- and  
7 slide 27 will come up on the screen. It's kind of an  
8 outline to his testimony as he's testifying. So it's  
9 26 and you'll see 27 along with that.

10 (Video Played)

11 MR. CORRIGAN: Your Honor, if you take  
12 a look at page 27, which was shown while Dr. Beyer was  
13 testifying --

14 THE COURT: Page 27 of --

15 MR. CORRIGAN: Slide 27 of today's  
16 presentation, yes.

17 Again, he talks about almost 2200 but  
18 for prices. One for each reagent for each year. And  
19 it accounts -- it acknowledges there would be some  
20 price dispersion in the but for market, but the third  
21 bullet point, if they did -- if he did what Ortho is  
22 asking he figures there would be 984,523 customer  
23 agent a year combinations. So instead of 2200 but for  
24 prices you have almost a million but for prices, and  
25 his estimation is that's sheer speculation and

1 unscientific. We haven't seen that.

2 The last bullet point is a linerboard  
3 (ph) example, Mr. St. Antoine made points there. I  
4 mean he used one but for price in a linerboard case,  
5 which passed mustard.

6 And we're not says it's okay in every  
7 case, because again, Daubert is fitness for each case,  
8 but a million is just unscientific and it's  
9 unworkable, and it's not necessary.

10 Let's take a look at the next slide,  
11 please, and that's slide 28. Now, I already know -- I  
12 already can anticipate this Court's reaction to this,  
13 but I'll try it any way.

14 This is a finding of the Court in your  
15 opinion, okay, and it's page 243 of your opinion.

16 "Estimating a single but for price  
17 for each product in each year is  
18 sufficient to estimate damages as a  
19 matter of just and reasonable  
20 inference."

21 Quoting Behrend there, but that's a  
22 place where Behrend is quoting Story Parchment.

23 So the Court in this opinion found, and  
24 I understand that is partly based on Dr. Beyer's  
25 testimony, but doing a million but for prices is

1 unworkable and it's unscientific and it makes no  
2 sense, and under the damages standard it's  
3 unnecessary.

4 Unless the Court has any other  
5 questions that's my presentation on the averaging and  
6 the one but for price.

7 THE COURT: I do not have any further  
8 questions.

9 MR. CORRIGAN: Thank you, Your Honor.

10 THE COURT: Thank you.

11 And now Mr. Coe.

12 MR. COE: Good afternoon, Your Honor.  
13 We're going to kind of start with the last issue that  
14 Mr. Corrigan addressed if that's okay with Your Honor.

15 THE COURT: That's fine.

16 MR. COE: This price aspersion issue.

17 THE COURT: Fine.

18 MR. COE: If we could turn to slide 25  
19 of our presentation. And, Your Honor, this is a slide  
20 that Dr. Bronstein had in his report as Exhibit 9-A to  
21 his report, but it's taken from Dr. Beyer's data, this  
22 is essentially an illustration of the average price --  
23 average actual price of this one product, anti-A  
24 Bioclone, 15 times 10 milliliter of Ortho and Anti-A  
25 Monosarah-1, 10 times 10 milliliter for Immucor, which

1 Dr. Beyer's said is comparable products, and it's  
2 compare the price per milliliter of those products  
3 over the course of the class period.

4 And if you'll notice in January 2005  
5 this graph changes. And if I could approach to  
6 monstrator, Your Honor?

7 THE COURT: Oh, I certainly see the  
8 dramatic change.

9 MR. COE: So there's a big gap starting  
10 in January of 2005, and it begins to close a little  
11 bit over the course of the class period, but by  
12 January 2009 again the gap is even wider.

13 So if you look at Immucor's price in  
14 January 2009 it's about \$3 per milliliter, and if you  
15 look at Ortho's price in January 2009 it's more than  
16 \$6 per milliliter. So Ortho's average price is more  
17 than twice Immucor's price by January of 2009. And  
18 we'll talk about why that was in a minute, but that's  
19 why we would argue that the second half of the class  
20 period is very different from the first half of the  
21 class period.

22 And another difference is that Dr.  
23 Beyer is not aware of any communications between the  
24 two defendants after this November 2000 time period  
25 that we spent so much time talking about, Your Honor.



1 We'd like to play a clip from Dr. Beyer's deposition  
2 where he talks about that.

3 (Video Played)

4 MR. COE: Go back to the slide for a  
5 second. So the pricing data doesn't suggest at all  
6 that Ortho and Immucor were coordinating prices.  
7 Dr. Beyer is not aware of any communications between  
8 the two parties that would enable them to coordinate  
9 prices, and yet he still opines that this conspiracy  
10 period extended for ten years based on these  
11 communications in a one-month or a three-week period  
12 in November 2000, and we don't think that makes sense,  
13 Your Honor, and he doesn't have a reliable basis for  
14 that opinion.

15 THE COURT: In what way is that  
16 significant?

17 MR. COE: Your Honor, we're talking  
18 about price dispersion here, so there's two forms of  
19 price dispersion.

20 One there's this price gap between  
21 Ortho and Immucor, second there's dispersion of prices  
22 for Immucor customers. And we think he should have  
23 accounted for both of these sets of price aspersion or  
24 the price gap, because they would have existed in this  
25 competitive but for world, and we don't think Dr.

1 Beyer has a reliable basis for not addressing this  
2 Ortho/Immucor price gap, Your Honor.

3 THE COURT: What about the sheer  
4 numbers of calculations that would be required?

5 MR. COE: I'll get to that, Your Honor.  
6 Why don't we turn to the next slide. We'll get into  
7 this Immucor pricing dispersion, which I think is  
8 where that concern comes in.

9 THE COURT: Fine.

10 MR. COE: So we know why this price gap  
11 started to open up in January 2005, that's because  
12 Immucor implemented two programs to compete and take  
13 share from Ortho.

14 The first was the price protection  
15 strategy, and Your Honor found in its earlier opinion  
16 that Immucor offered to freeze traditional reagent  
17 prices for five years for customers that agreed to  
18 lease its automated equipment, and that also can be  
19 found in Ortho Exhibit 70.

20 The second program is this pricing  
21 differentiation strategy, and we've -- this is on  
22 slide 26. We've taken one page from that presentation  
23 and blown it up, but this is Ortho Exhibit 69, Your  
24 Honor, which is a copy of this pricing differentiation  
25 strategy program.

1                   And the first thing that's important to  
2 note on this document is the first bullet which says,  
3 "Increase Immucor market share by 20 percent. Ortho  
4 takeaways." So the purpose of this program was to  
5 steal customers from Ortho.

6                   Pause it for a second there.

7                   The third bullet -- sorry -- is the  
8 next place that you should focus on, and that's, you  
9 know, an explanation of what this pricing  
10 differentiation strategy was.

11                  So they were setting up these price  
12 tiers, as I think everyone has referred to them,  
13 starting in this January 1st, 2005, based on the  
14 percentage of reagents a customer would commit to  
15 buying from Ortho.

16                  So at the time they were called base  
17 Level I, Level II, the names of the tiers changed over  
18 time, a new tier was added for customers that leased  
19 the automated equipment, but the concept was generally  
20 the same, that Immucor had at least four, and at times  
21 six tiers of prices, for its customers.

22                  And we asked Dr. Beyer why Immucor  
23 implemented this pricing differentiation strategy, and  
24 we'll play his response to that for Your Honor.

25                  (Video Played)

1 MR. COE: So, Your Honor, as Dr. Beyer  
2 himself admits, this was a program Immucor implemented  
3 to compete with Ortho. So in creating his but for  
4 world that's supposed to reflect perfect competition  
5 he should have accounted for these price tiers. And I  
6 think our next slide will show you what these tiers  
7 look like. Slide 27.

8 And this is a slide from Dr. Beyer's  
9 report, this is figure 7, and Dr. Bronstein walked  
10 through -- used this chart in his presentation at the  
11 first class cert hearing in 2012, and if you'll  
12 recall, Your Honor, he pointed to the difference in  
13 price between the lowest tier and the highest tier.  
14 And I can try and recreate that for Your Honor.

15 This lowest price tier here is the  
16 price protected tiers, so these are the customers who  
17 had their prices frozen for five years, and --

18 THE COURT: Is that -- how is that  
19 identified?

20 MR. COE: Your Honor, the legend is up  
21 at the top, so --

22 THE COURT: I'm looking at it.

23 MR. COE: -- second from the left is  
24 the red with the square and it says price P. Now I'll  
25 admit the squares get a little squashed up.

1 THE COURT: All right. I see it.

2 MR. COE: Sure. So -- I don't have my  
3 copy where I've written this all out, but -- so I'm  
4 trying to do this from memory.

5 The second price tier would be the  
6 automation tier, so you'll see the orange with the  
7 triangle is the automation tier. I believe the blue  
8 line is what was called the market tier at that time.  
9 there's that ME which I --

10 THE COURT: It looks like it's the pre-  
11 2004 quarter three tier.

12 MR. COE: I believe that's this one,  
13 Your Honor.

14 THE COURT: Yes.

15 MR. COE: Oh, here's mine. So, I think  
16 this blue right here, the one, two, three, four, fifth  
17 from the left, ME.

18 THE COURT: I see we have two blues.

19 MR. COE: We do -- we actually have  
20 three blues, Your Honor. There are only so many  
21 colors to deal with all these tiers, Your Honor.

22 The purple line is the market price.  
23 So the fourth from the left, the purple line with the  
24 X is the market price. And the top line, the orange  
25 line with the circles, is the list price. So the list

1 price in January 2009 was approximately \$300.

2 Now, I don't want to leave aside the  
3 points that there was also a price dispersion both  
4 before the class period and during the first half of  
5 the class period, and Dr. Bronstein at the class cert  
6 hearing had some slides made of Dr. Beyer's bubble  
7 charts where he kind of blew up the numbers for the  
8 first half of the class period and show there was  
9 price aspersion earlier, but it was a little bit  
10 smaller. For example, Immucor's prices for this  
11 product in 1999 ranges from about \$5 to \$20 or a  
12 difference of the highest was about four times the  
13 lowest. By 2009 that difference was six times the  
14 lowest, as we'll get to in a minute.

15 Believe it or not Mr. Corrigan played a  
16 clip I was going to play, so I'll refer you back to  
17 the plaintiff's slides, I believe it's slide 26. I  
18 won't replay the whole thing for Your Honor, the point  
19 of course that I want to focus on starts at line 10.

20 THE COURT: Let me get there.

21 MR. COE: Sure.

22 THE COURT: 26?

23 MR. COE: Correct, Your Honor.

24 THE COURT: No, 26 is Beyer's  
25 testimony.

1 MR. COE: Correct, Your Honor.

2 THE COURT: Oh.

3 MR. COE: And I just want to read one  
4 excerpt from that testimony.

5 THE COURT: All right. I'm sorry. Go  
6 ahead.

7 MR. COE: He says:

8 "The reality is of course there  
9 would be some price dispersion in the  
10 but for market for good reasons.  
11 Smaller firms would receive higher  
12 prices, strategic firms would most  
13 likely receive lower prices."

14 But then he goes on to say, "It would  
15 just be too complicated for me to account for this."

16 And Your Honor asked about that  
17 question, you know, would he have to come up with a  
18 million different but for prices to account for this,  
19 and I want to point to one thing from your opinion,  
20 Your Honor, that suggests that might not be the case.

21 THE COURT: What page?

22 MR. COE: It's page 243, Your Honor.

23 THE COURT: I'm there. Tell me what --

24 MR. COE: It's after the first cite to  
25 the Behrend's opinion, what Ortho proposes.

1 THE COURT: I have 243. Quoting Story  
2 Parchment? That?

3 MR. COE: Correct. Right after -- the  
4 next sentence after that cite, Your Honor.

5 THE COURT: Let me -- yes, I see it.

6 MR. COE: So the Court found:

7 "What Ortho proposes would

8 exponentially complicate the

9 calculation

10 of damages in this type of case. As  
11 Dr. Beyer testified it would require  
12 plaintiffs to estimate almost a million  
13 different but for prices."

14 So that's the point plaintiffs made  
15 earlier today.

16 But I want to also point you to a  
17 sentence in the next paragraph, and this is after Your  
18 Honor's cite to -- there's a -- it cites McDunna (ph)  
19 and then you also cite to Professor Wright's (ph)  
20 treatise, and I'm reading the sentence after that.

21 THE COURT: In his reply? Is that  
22 what --

23 MR. COE: Correct, Your Honor. So in  
24 his reply report Dr. Beyer shows that the prices paid  
25 by most Immucor customers after 2005 corresponded to



1 one of the standard pricing tiers and is a  
2 straightforward to calculate an overcharge percentage  
3 for each pricing tier.

4                   So in the real world it would be  
5 straightforward for Dr. Beyer to account for these  
6 pricing tiers, but he claims it would be unbelievably  
7 complicated in requiring to calculate a million but  
8 for prices to account for these ties in the but for  
9 world. That doesn't make sense to me, Your Honor.  
10 But even if it's true this he needs to calculate a  
11 million but for prices, that does not excuse Dr. Beyer  
12 from using an unrealistic, an unreasonable methodology  
13 that does not result in the calculation of damages as  
14 a matter of a just and reasonable inference.

15                   And turning to your next slide, Your  
16 Honor. In your opinion the Court excused Dr. Beyer's  
17 use of one but for price on the grounds that other  
18 courts had accepted Dr. Beyer's -- or expert's failure  
19 to account for price aspersion even through there was  
20 variable prices in those cases as well. And one of  
21 the cases the Court cited to was Judge Brody's opinion  
22 in the McDunna case, and I know how much respect you  
23 have for Judge Brody, and we have a former Judge Brody  
24 clerk in the room, so we'll assume that she got it  
25 right, Your Honor, and that the level of price

1 dispersion in the McDunna case was acceptable. But as  
2 we walk through in our brief, the level of dispersion  
3 in that case ranged from about 135 percent to about  
4 150 percent.

5 We also cited to Your Honor the Reed  
6 (ph) case where the judge found that there was too  
7 much price dispersion to allow for the calculation of  
8 damages as a just and reasonable inference, and in  
9 that case the dispersion was about 190 percent, or the  
10 lowest wages were about -- I'm sorry -- the highest  
11 wages were about two times the lowest wages.

12 As we just showed to Your Honor, here  
13 the difference between the highest price and the  
14 lowest price is 600 percent, where the highest price  
15 is 6 times the lowest price.

16 THE COURT: Mr. Coe, turning to Reed,  
17 wasn't averaging used in both the but for world and  
18 the real world in Reed?

19 MR. COE: That's probably correct, Your  
20 Honor, I'd have to go back and -- I'd have to go back  
21 and look at it.

22 THE COURT: Does anyone in the room,  
23 including Judge Brody -- Judge Brody was involved in  
24 McDunna.

25 MR. COE: Correct, Your Honor.

1 THE COURT: The Toys R Us case. I'm  
2 familiar with that case. And Reed I'm not -- I  
3 haven't reread Reed.

4 MR. COE: I have copy, Your Honor, I'd  
5 be happy to read it at the next break. I'm not sure  
6 it makes a difference is I guess where I come out,  
7 because you're still trying to determine how much  
8 price dispersion is, and there is a limit because --

9 THE COURT: Does it matter -- well what  
10 is the significance?

11 MR. COE: And I will touch on that,  
12 obviously, Your Honor.

13 THE COURT: I'm sorry, let me finish.  
14 Significance between using it -- using the averaging  
15 only in the but for world as opposed to both in the  
16 real world and the but for world? You don't have to  
17 answer it right now if you think the answer is in Reed  
18 or some other --

19 MR. COE: Right. I'm not sure there a  
20 difference, Your Honor, because we're still looking at  
21 how much variation there is on price and how much of  
22 that variation is acceptable, but I'll go back and  
23 look at that passage, Your Honor.

24 We have one more slide I wanted to show  
25 you on this, and this is just some math we did from a

1 table in Dr. Beyer's report And Dr. Beyer's chart of  
2 the prices in four of these tiers in 2009. He does  
3 not include the price protected tier in his chart.  
4 And this chart is at -- it's Table 10 of Dr. Beyer's  
5 reply report, Your Honor.

6 THE COURT: Paragraph 18. Yes, I see  
7 that.

8 MR. COE: So this actually  
9 underestimates the amount of price aspersion, because  
10 he's not including the lowest prices in that chart,  
11 he's eliminating that price protected tier that was at  
12 the bottom of the (indiscernible) chart we showed you  
13 earlier. But even eliminating that lowest price and  
14 just taking the gap between the automated price and  
15 the list price, for every single one of these products  
16 the highest price is four times the lowest price.

17 So, Your Honor, asked what's the  
18 problem with this price dispersion, and there's two  
19 problems.

20 The first is if you assume in the but  
21 for world that the same amount of price dispersion  
22 exists then these customers who are paying a higher  
23 actual price would also be paying a higher but for  
24 price. So their damages would be much smaller and  
25 possibly they would have no damages or there would be

1 no impact.

2 The converse of that problem is the  
3 customers who are paying the lower actual price would  
4 also be paying a lower but for price. So their  
5 damages would actually be bigger.

6 And you might ask why would Ortho care  
7 about that? And maybe Ortho doesn't care about that,  
8 but I think it is a concern the Third Circuit has  
9 raised in the Karara (ph) case, and in that case they  
10 said the court -- the certification requirements are  
11 meant not to just protect defendants, but they're also  
12 designed to protect class members -- absent class  
13 members. And if the recovery of an absent class  
14 member is going to be diluted then a class should not  
15 be certified. And that's what's going to happen here  
16 to these strategic customers, as Dr. Beyer called  
17 them, the large customers, they're going to have their  
18 recovery diluted.

19 So on the one hand you have the smaller  
20 customers who might not have been impacted, on the  
21 other hand you have the larger customers whose  
22 recovery is going to be diluted because they're  
23 basically sending their damages to the smaller  
24 customers, Your Honor.

25 That's all I have on that topic, Your

1 Honor.

2 THE COURT: Thank you.

3 MR. COE: Now would be a good time for  
4 that break, Your Honor, and then we could start up  
5 with RhoGAM and the Immucor costs?

6 THE COURT: Absolutely. We're in  
7 recess for ten minutes.

8 THE BAILIFF: All rise.

9 (Recessed at 3:25 p.m.; reconvened at 3:41 p.m.)

10 THE COURT: Please be seated.

11 Mr. Coe, before we switch gears, during  
12 the recess I took a look at some exhibits, and I noted  
13 that the variation in pricing of the ten leading,  
14 products, Immucor's top ten products for years other  
15 than 2009 seem to be less than that in 2009. Do you  
16 agree?

17 MR. COE: I agree that they did  
18 increase over time, Your Honor. If we can go back to  
19 --

20 THE COURT: I'm looking at --

21 MR. COE: Right, we can go back to  
22 slide 27, Your Honor. You'll notice from 2005 to  
23 2008, I guess you would call it, there's --

24 THE COURT: Very little.

25 MR. COE: -- less dispersion. Well,

1 Your Honor, I think part of the problem here is the  
2 scale of these charts, so as Dr. Bronstein showed when  
3 you blow these up and change the scale that the charts  
4 obviously look very different. But as compared to  
5 from 2000 -- July 2008 forward I would agree that  
6 there is less price dispersion, Your Honor.

7 THE COURT: The dispersion in 2005, I'm  
8 looking at exhibit -- no, it's the reply. It's your  
9 reply in support of plaintiff's motion for plan cert.  
10 So it's the bottom in 2012. But it's Beyer's report  
11 and it's Table 6, and for 2005, for example, one  
12 product it shows the dispersion is between customers  
13 84 to 120, another 200 to 270, another 28 to 36,  
14 another 72 to 95. That's for 2005. And the same is  
15 generally true of 2006. Much more dramatic in 2009.  
16 Of what significance is that? It's still -- it  
17 doesn't change your argument, it just changes the --

18 MR. COE: Only as a matter of degree,  
19 Your Honor. As we said, we do think this is a problem  
20 that increases with time, particularly after January  
21 2005 in these price increases -- I'm sorry -- these  
22 pricing tiering are implemented and it's obviously  
23 much more pronounced after --

24 THE COURT: All right. You can move  
25 now --

1 MR. COE: -- July 2007, I guess is when  
2 it appears to separate out if we're on this -- at  
3 least on this slide, Your Honor.

4 THE COURT: Yes. And you're referring  
5 to slide 27.

6 MR. COE: Correct, Your Honor.

7 THE COURT: All right. You may proceed  
8 to the post-2005 issues.

9 MR. COE: Before I do, Your Honor, I  
10 did go back and read the Reed case. Fairly quickly,  
11 so I'm sure you'll want to -- or Liz will want to read  
12 it herself -- but my reading of this case -- there's  
13 two points -- two pages or two excerpts that I think  
14 are relevant.

15 The first is on page 585 when they --  
16 the court describes Dr. Rouser's (ph) fourth wedge  
17 analysis.

18 My first observation, Your Honor, is  
19 Dr. Rouser did a lot more than Dr. Beyer did in this  
20 case, a number of analysis, but I believe the fourth  
21 wedge was the one that the Court says it actually  
22 based its certification decision on, so, I believe  
23 that's the one that is most relevant.

24 And my reading of this is that there  
25 was a difference in the methodology that Dr. Rouser



1 was using. Instead of subtracting the actual price --  
2 I'm sorry -- the but for price from the actual price  
3 he actually calculated an overcharge percentage, which  
4 was based on the average difference between the  
5 average competitive wage or the average but for wage  
6 and the average actual wage. That came out to be 11.3  
7 percent, and he said everyone in the class, their wage  
8 was suppressed by that 11.3 percent, and that's how  
9 I'm going to calculate damages.

10 But when we talk about the use of  
11 averages, which is on page 591, what the Reed court  
12 points to is the aspersion in wages in the actual  
13 world, and it's that wage aspersion in the actual  
14 world that renders Dr. Rouser's methodology  
15 unreliable, Your Honor.

16 THE COURT: Was averaging used in both  
17 actual world calculations and real world -- and but  
18 for world calculations?

19 MR. COE: Yes, Your Honor.

20 THE COURT: All right.

21 MR. COE: So, Your Honor, we're going  
22 to be going back to talking about costs again in  
23 connection with the Immucor cost benchmark, and before  
24 we did that I wanted to clean up some of the argument  
25 from this morning, because I think we were talking

1 about a lot of different costs, and I wanted to go  
2 back to which costs were important and why we were  
3 talking about them. And I would say we used cost  
4 yesterday to illustrate three points.

5 The first point was that Dr. Beyer ignored  
6 costs in the first half of this -- of the class period  
7 in his operation to create value benchmark, and that  
8 was unscientific. And I think what's important to go  
9 back to there is that when Dr. Beyer used the standard  
10 cost in the second half -- I'm sorry -- uses cost in  
11 the second half of the class period to estimate how  
12 much prices would go up he used these Immucor standard  
13 costs.

14 THE COURT: You said standard costs.

15 MR. COE: Immucor standard costs,  
16 correct, Your Honor.

17 THE COURT: Did Immucor differentiate  
18 between standard costs and actual costs?

19 MR. COE: I don't know, Your Honor.

20 THE COURT: Well then you -- how can  
21 you say that he used Immucor standard costs?

22 MR. COE: That's how Immucor described  
23 them, Your Honor, was their standard costs, and that's  
24 how Dr. Beyer describes them in his report.

25 THE COURT: Well then what you're

1 telling me is you don't know whether standard costs  
2 for Immucor are the same as actual costs.

3 MR. COE: That's correct, Your Honor.  
4 But why I'm telling you this is -- Joshu, do you have  
5 Dr. Bronstein's presentation from the class cert  
6 hearing? I think it's our Exhibit 120.

7 THE COURT: I probably -- I'm sure I  
8 have it. Yes, I have it. What page?

9 MR. COE: It's page 7, but  
10 unfortunately the pages were not numbered, Your Honor,  
11 so -- it has the changes in standard costs is the  
12 title.

13 THE COURT: We're looking at  
14 Dr. Bronstein's testimony, July 26th, 2012?

15 MR. COE: Correct, Your Honor.

16 THE COURT: And it's page?

17 MR. COE: I believe it's 7, Your Honor,  
18 but there's not a page number on it.

19 THE COURT: Across the top, changes in  
20 standard costs. Yes, I have it.

21 MR. COE: So these are what Dr. Beyer  
22 decided the increases in Immucor standard costs were  
23 throughout the class period. And as you can see in  
24 2001, 2002, 2003, and 2004 those cost increases were  
25 significant. They range from 18 percent to 25

1 percent.

2           So our first criticism of Dr. Beyer on cost  
3 is that he could have accounted for these costs in his  
4 operation to create value benchmark in the first half  
5 of the class period.

6           Now while we're going get very shortly  
7 to the Immucor cost benchmark, and he did use these  
8 Immucor standard costs in the second half of the class  
9 period, and one of our arguments is that he did that  
10 purposefully to flatten out prices, and you can see  
11 there's a sharp difference between the price increases  
12 in the first half of the class period and the second  
13 half of the class period. In the second half of the  
14 class period their range from three percent to six  
15 percent, Your Honor.

16           And Joshu, if you can pull up slide 35.

17           THE COURT: Those percentages are  
18 basically the same. Not quite the same, but basically  
19 the same for Ortho in the post-2005 period.

20           MR. COE: Correct, Your Honor, though I  
21 believe he was using Immucor standard cost data to  
22 estimate the increase in Ortho's standard policy you  
23 would expect them to be pretty close.

24           THE COURT: Well you keep saying  
25 Immucor's standard costs. There's no -- there is a

1 difference between Ortho's standard costs and Ortho's  
2 costs. Total costs are more.

3 MR. COE: And that's exactly the point  
4 here, Your Honor. We're not -- we will quibble later  
5 with the use of Immucor's standard costs as a proxy  
6 for Ortho's costs, but -- and we'll also quibble with  
7 whether you can use just cost to measure but for  
8 prices, but I don't believe we are challenging  
9 Dr. Beyer's use of Immucor's standard costs to account  
10 for Immucor's increases in cost in the second half of  
11 the class period. Does that make any sense to Your  
12 Honor?

13 What we're trying to illustrate here is  
14 that when Dr. Beyer was deciding that he didn't want  
15 to account for costs in his first half of the class  
16 period, in part because these cost increases did not  
17 entirely explain the price increases, these are the  
18 numbers that he was looking at when he made that  
19 decision.

20 THE COURT: All right.

21 MR. COE: So now I want to turn to my  
22 second point. And that second point that we made was  
23 that it's inappropriate to rely on a 1999 business  
24 plan to predict what Ortho was going to do for five  
25 years. And that was the -- we talked about the Tunis

1 case when -- because there are changes in the market  
2 many courts have rejected an expert's reliance on a  
3 business plan, it's inconsistent with what happened in  
4 the real world. So we showed you this slide 35, Your  
5 Honor, which compared Ortho's prediction of what its  
6 costs would be.

7 THE COURT: Yes, I -- for the years  
8 2001, 2002 --

9 MR. COE: Correct, Your Honor.

10 THE COURT: -- 2003.

11 MR. COE: So the point we were making  
12 here is that in 2000 -- in the year 2000, on  
13 September 15th, 2000, to be exact, in Plaintiff's  
14 Exhibit 54, Ortho is predicting that its standard cost  
15 would be \$10.2 million in 2003, but in hindsight after  
16 2003 --

17 THE COURT: What did you say 10.?

18 MR. COE: Right here, Your Honor.

19 THE COURT: I'm just looking at the --  
20 that's total COGS.

21 MR. COE: Correct, Your Honor.

22 THE COURT: The standard costs were I  
23 thought 10.9.

24 MR. COE: Well if you do the math, Your  
25 Honor, they start with this 10.9 standard costs.

1 THE COURT: Yes.

2 MR. COE: Then they have a line for  
3 reduction and costs of goods sold from lien savings  
4 and other favorable variances.

5 THE COURT: All right. Okay. You end  
6 up with 10.2. I see.

7 MR. COE: Right. But when they got to  
8 -- when 2003 was over and they actually looked at what  
9 their actual costs were it was 24.88 million, which is  
10 this number in the top half of the screen, Your Honor.

11 So the point of all that was to show  
12 you that things changed in the real world and it's not  
13 appropriate, as Mr. Bronstein opined, for an  
14 economist, to completely substitute his judgment for  
15 the judgment in a business plan, especially when that  
16 business plan is inconsistent with what happened in  
17 the real world.

18 THE COURT: Well what you're talking  
19 about is a long-term plan where predictions at the  
20 inception of the long-term plan turn out to be  
21 incorrect.

22 MR. COE: Correct, Your Honor. And of  
23 course we would argue that it was not a long-term  
24 plan. And I don't want to belabor that point, but  
25 there is no evidence that when Ortho was spending all

1 this time and effort in 1999 and early 2000 to come up  
2 with operation to create value that they ever looked  
3 beyond two years. Plaintiff's counsel has made --

4 THE COURT: Except for that one  
5 statement, and we keep referring to it in the BB --

6 MR. COE: Again, Your Honor, that's in  
7 the blood bank leadership program, so that's --

8 THE COURT: Yes, but we've covered  
9 that. I don't want to -- I've got that --

10 MR. COE: I understand. But the only  
11 point I want to make, that's nine months later,  
12 plaintiffs can't rely on the thought and effort that  
13 went into the operation to create value plan, which  
14 was this two-year plan, and apply it to that five plus  
15 years prediction that was in blood bank create value.  
16 There's no evidence that anyone spent any time or  
17 effort to come up with that number. Because at that  
18 point they're focused on the next plan, the blood bank  
19 leadership program. But you're right, Your Honor,  
20 we've covered that in exhaustive detail. So let me  
21 turn --

22 THE COURT: But what -- are there any -  
23 - you cited a case, and I don't recall that we've  
24 talked about cases on this issue. The cases that  
25 address the question of reliance on a business plan



1 over a long-term or over a period of years, it doesn't  
2 necessarily have to be a long-term plan, where real  
3 life, real world situations change.

4 MR. COE: I'll give you those  
5 citations, Your Honor. I have the wrong binder.

6 (Pause)

7 MR. COE: Right, that's the Tunis  
8 Brothers versus Ford Motor Company, it's a Third  
9 Circuit case from 1991, and it's -- the citation is  
10 952 F.2d 715. We cite that -- I think all these cases  
11 at page 13 of our brief, Your Honor. The other two  
12 cases we cite are the Advent Systems Ltd. versus  
13 Unisys Corp. case, another 1991 Third Circuit opinion,  
14 and the citation of that is 925 F.2d 670. And then  
15 the JMJ Enterprises Inc. versus VO Benito Italian Ice,  
16 Inc., and that's a Lexis unreported decision in 1998,  
17 U.S. Lexis 5098, that was out of the Eastern District  
18 in 1998, Your Honor.

19 And do you have our Exhibit 10 Joshu?  
20 And, Your Honor, the last point that came up this  
21 morning was did Ortho's prices actually go up during  
22 this first half of the class period? And Your Honor  
23 pointed out that that page we showed you from  
24 Plaintiff's Exhibit 54 was a prediction of standard  
25 costs, it didn't include costs not in the standard.

1 THE COURT: Yes.

2 MR. COE: And you asked if there was  
3 any evidence in the record of what costs not in the  
4 standard were at that time.

5 So before I get to that, I mean I think  
6 the first point is Dr. Beyer wasn't looking at Ortho's  
7 actual costs, he was looking at Immucor standard  
8 costs, and he thought they were going up.

9 THE COURT: This is for the post?

10 MR. COE: This is for the first half of  
11 the class period, Your Honor. So this is an  
12 August 26th, 1999 documents, our -- Ortho's Exhibit  
13 No. 10, Your Honor.

14 THE COURT: Exhibit 10 for what? In  
15 what proceeding?

16 MR. COE: It's Ortho's exhibit, I  
17 believe it was to our original brief, Your Honor, our  
18 original opening brief.

19 THE COURT: Oh, the remand brief.

20 MR. COE: No, the 2012 opening brief,  
21 Your Honor. We had to dig this out in response to  
22 Your Honor's question.

23 THE COURT: And do I have that?

24 (Clerk confers with the Court)

25 THE COURT: All right. I have

1 Exhibit 10.

2 MR. COE: Joshu do you remember what  
3 page we were looking at? The Bates number on the last  
4 -- the page we're focusing on is 1487, Your Honor.

5 THE COURT: All right. I have 1487.

6 MR. COE: So this is a document that  
7 came from Norbridge's production, Your Honor.  
8 Norbridge is the consultant working on operation to  
9 create value, it appears to be a document Ortho  
10 provided to Norbridge, and it does have a standard  
11 cost and a cost non-standard number. If you look  
12 under the total traditional blood bank column the  
13 standard costs I believe were \$12.47 million.

14 THE COURT: What? 12.47? Yes, I have  
15 -- I have total traditional blood bank. Is that the  
16 column you're looking at?

17 MR. COE: Yes, Your Honor. In the  
18 second number down --

19 THE COURT: Standard costs are 12.474.

20 MR. COE: Exactly, Your Honor. And  
21 then a few more numbers down is other costs not in  
22 standard.

23 THE COURT: Yes.

24 MR. COE: And that's 2.22 million.

25 THE COURT: Yes.

1 MR. COE: So, I did the math, and I'm  
2 sure plaintiffs will second check me, but adding those  
3 numbers I got 14.694 million in actual costs for Ortho  
4 in 1999. So that's just adding the 12.74 million to  
5 the 2.22 million.

6 THE COURT: Well it's evidence that  
7 Ortho used cost not included in standard costs in this  
8 chart. Is that what you're --

9 MR. COE: And it's also evidence of  
10 that Ortho's actual costs were in 1999 for traditional  
11 reagents.

12 THE COURT: Okay.

13 MR. COE: And going back to the FTC  
14 data, which I believe was slide 35 -- maybe we  
15 actually want to go back to that exhibit, Joshu, it's  
16 Plaintiff's Exhibit 171.

17 THE COURT: Yes. I have it.

18 MR. COE: The actual costs in 2005,  
19 Your Honor, were 21.987 million, which is higher than  
20 the 14.694 million from 1999.

21 So over this period of time in the  
22 first half of the class period the evidence is that  
23 Ortho's actual costs did in fact increase, and we  
24 would argue that argues for Dr. Beyer having to  
25 account for Ortho's cost in his operation to create

1 value benchmark for the first half of the class  
2 period.

3 THE COURT: Do we have the same figures  
4 for -- the figures that I'm looking at in Exhibit 171,  
5 which is -- well it's identified -- it's the FTC  
6 submission, we have the figures for 2003 through 2008.  
7 Do we have figures for 2000 and 2001 and '02?

8 MR. COE: We don't, Your Honor, and you  
9 asked that question earlier --

10 THE COURT: I think --

11 MR. COE: -- and I went back to the --  
12 this was actually an attachment to Ortho's submission,  
13 and I don't know if I have the exhibit number, but one  
14 of plaintiff's exhibits was the rest of Ortho's  
15 submission.

16 THE COURT: Well why are we looking at  
17 the 1999 figures when they're not included in any of  
18 Dr. Beyer's reports?

19 MR. COE: Because Your Honor asked the  
20 question if we had any data about what Ortho's actual  
21 costs were in 1999 or 2000 or earlier in this class  
22 period.

23 THE COURT: I think I asked whether  
24 there was any evidence of cost not included in the  
25 standard cost. But the 1999 figures are not relevant

1 to Dr. Beyer's calculations are they?

2 MR. COE: They are, Your Honor, because  
3 Dr. Beyer ignored costs in the first half of the class  
4 period.

5 THE COURT: Yeah, but 1999 costs are  
6 not included in the first half of the class period.

7 MR. COE: You're right, Your Honor. So  
8 there's two points here.

9 One, he thought -- he uses Immucor's  
10 standard costs as his goal standard, Immucor's  
11 standard costs were going up --

12 THE COURT: Not for the first --

13 MR. COE: -- for the first half of the  
14 class period.

15 THE COURT: But he doesn't use them in  
16 the first --

17 MR. COE: But he does use them in the  
18 second half of the class period.

19 THE COURT: Yes.

20 MR. COE: So he thought those were  
21 going up in the first half of the class period, but he  
22 still decided to ignore them. And we also have  
23 evidence that Ortho's actual costs were going up in  
24 the first half of the class period. So --

25 THE COURT: Not according to Dr. Beyer.

1 I think we've discussed this. Doesn't he conclude  
2 that they went up only 6.4 percent?

3 MR. COE: Your Honor, he was looking at  
4 this 2003 to 2008 time period, so it overlaps.

5 THE COURT: That's because he didn't  
6 have the 2001.

7 MR. COE: Well it was in the record,  
8 Your Honor. And he didn't have the -- going back to  
9 your question about whether this data exists for --

10 THE COURT: This data being the 1999  
11 data.

12 MR. COE: Well or in this format of  
13 what Ortho submitted to the FTC. Anyone know the  
14 exhibit? I have it in my head as Plaintiff's Exhibit  
15 165, but I'm not --

16 THE COURT: I'm looking -- is it 171  
17 or --

18 MR. COE: I'm looking for the narrative  
19 submission to the FTC, Your Honor, where Ortho  
20 responded -- you know, it looks like a subpoena  
21 essentially, Your Honor.

22 THE COURT: It's dated October 17th,  
23 2008, but not -- that's not the letter of transmittal.

24 MR. COE: Correct, Your Honor. This  
25 was an attachment to the letter of -- essentially to

1 Ortho's subpoena response, and we'll try and find the  
2 actual document, but in that response Ortho said we  
3 did not maintain this data in the normal course of  
4 business before 2003. So the FTC had asked for  
5 earlier data, but Ortho said it did not have that  
6 data, Your Honor.

7                   So one more point about costs following  
8 up from this morning. So the last point we wanted to  
9 make was Ortho had set -- or I'm sorry -- Dr. Beyer  
10 had set this 40 percent -- I'm sorry -- Dr. Beyer set  
11 a 50 percent gross margin goal for Ortho, plaintiffs  
12 lowered it to 40 percent, and we've spent a lot of  
13 time arguing why that wasn't a realistic goal, but we  
14 also wanted to make the point that if you include  
15 actual costs in 2005 Ortho had not met that 40 percent  
16 goal that Dr. Beyer made up for Ortho. And if we go  
17 back to slide --

18                   THE COURT: That's only if you include  
19 the costs that were known for --

20                   MR. COE: The non-standard. Correct,  
21 Your Honor.

22                   So if you go back to that document I  
23 handed up this morning, which compared Dr. Beyer's  
24 table with the FTC submission for 2005, that was the  
25 last point we were trying to make about cost. And for



1 that point it doesn't really matter what Ortho's costs  
2 were in 2000 or 2001 or 2003, the question is what  
3 were they in 2005? Because the calculation, revenues  
4 minus costs for that year, and going -- you know, we  
5 went through this yesterday, but if you use the actual  
6 costs or costs non-standard you would actually have a  
7 negative, you'd be losing money in Dr. Beyer's but for  
8 world, Your Honor.

9 THE COURT: Yeah, but comparing those  
10 two documents -- we talked about this this morning --  
11 the sales jumped in the -- increased dramatically in  
12 the second document.

13 MR. COE: Correct, Your Honor -- well  
14 there was -- the revenues in the FTC data were higher  
15 than what Dr. Beyer said his total sales were in his  
16 data or transaction data.

17 THE COURT: So what significance is  
18 that?

19 MR. COE: I don't know that it has any,  
20 Your Honor, because we're looking at costs, and I  
21 haven't seen any translation of that into costs, Your  
22 Honor. I haven't seen any challenge of the cost data  
23 in the FTC submission, Your Honor.

24 THE COURT: Well except that the  
25 plaintiffs say they never got it. The actual cost.

1 MR. COE: That's correct, Your Honor.  
2 That's correct. They also said they didn't ask for  
3 it.

4 THE COURT: Well --

5 MR. COE: And I know --

6 THE COURT: -- not --

7 MR. COE: -- we went back and forth on  
8 that.

9 THE COURT: -- exactly. Not exactly.  
10 Corrigan said he asked for costs, he didn't -- he  
11 doesn't think he specifically asked for the costs not  
12 included in standard costs. Is that a fair statement,  
13 Mr. Corrigan?

14 MR. CORRIGAN: Yes, Your Honor. I can  
15 elaborate a little bit on that.

16 THE COURT: No you don't have to.

17 MR. CORRIGAN: Okay. Yes, that's fair.  
18 The give and take on that is more general.

19 MR. COE: That letter to the FTC was  
20 Exhibit 165? We'll follow up with that, Your Honor.

21 So I want to move on to the Immucor  
22 cost benchmark, Your Honor, which is slide 38 of our  
23 presentation.

24 At the top of this chart, this  
25 demonstrative we have what Dr. Bronstein and I believe

1 most economists -- all economists, including Dr. Beyer  
2 would say are the three major determinants of price.  
3 Market structure, cost, and demand.

4 And for the first half of the class  
5 period this OCB benchmark we have already argued and  
6 we won't go back into this, that the only one they  
7 took into account was market structure and they  
8 ignored cost and demand.

9 And for this Immucor cost benchmark  
10 we'll argue that the only determinant or variable they  
11 took into account was cost and they ignored market  
12 structure and demand.

13 THE COURT: And you're talking about  
14 the -- in the Immucor cost column you're talking about  
15 the post-2005 period.

16 MR. COE: Correct, Your Honor.  
17 Starting January 1, 2006 through 2006. Correct, Your  
18 Honor.

19 So the way I look at this is that each  
20 one of these factors contributes in some way to costs.  
21 So you have your cost in 2006, how much is it going go  
22 up to 2007? Well the first building block you have,  
23 Your Honor, is demand, and demand -- if demand goes up  
24 price is going to go up by some amount.

25 The second building block --

1 THE COURT: Wait a minute, demand goes  
2 up, price --

3 MR. COE: Right. Exactly, Your Honor.

4 THE COURT: Okay.

5 MR. COE: If there's more demand the  
6 price is going to go up.

7 THE COURT: All right. I have it.

8 MR. COE: Right. The second building  
9 block is cost, Your Honor. If cost goes up --

10 THE COURT: Oh, and you're --

11 MR. COE: Your Honor, it's a little --  
12 I have a two year old and a four year old so these are  
13 the materials I have to work with, Your Honor, but I  
14 thought I'd illustrated a point.

15 THE COURT: No, you're illustrating  
16 with large LEGO blocks on the second day of a two-day  
17 hearing at 4:10.

18 MR. COE: So we have cost then we have  
19 market structure. The less competition there is in a  
20 market cost will go up, as Your Honor recognized in  
21 his earlier opinion. Those are the first three.

22 Now plaintiffs have argued that there's  
23 a fourth building block, that the cartel contributed  
24 to even more of price increase than what have happened  
25 in this but for world that only accounted for these

1 first three factors. Market structure, cost, and  
2 demand.

3 So there'd be -- the total cost would  
4 be, if they're right that there was a conspiracy, it  
5 would be made up of demand, cost, market structure,  
6 and whatever additional price increase was the result  
7 of this cartel.

8 After Comcast v. Behrend the Court  
9 needs to separate out each one of those factors, and  
10 Dr. Beyer needs to separate out each one of those  
11 factors in calculating a price. Because if he fails  
12 to account for cost, demand, or market structure he's  
13 awarding damages to plaintiffs for factors that have  
14 nothing to do with this caral, this top piece. So --

15 THE COURT: Except it's the top piece  
16 that sets the price.

17 MR. COE: It's not, Your Honor, it's  
18 all four pieces that lock together to set the price.

19 THE COURT: I read Comcast and Behrend.  
20 Is there a specific statement to that effect or  
21 instead --

22 MR. COE: I'm --

23 THE COURT: Oh, you're on --

24 MR. COE: I'm glad you asked, Your  
25 Honor.

1 THE COURT: Uh-oh, I may --

2 MR. COE: So, I'll read you --

3 THE COURT: The record should show that  
4 everyone on the left side of the room is smiling. You  
5 laid this trap for the Court and --

6 MR. COE: I don't know, it's certainly  
7 not described as a trap, Your Honor. But I would like  
8 to read from pages 1434 and 1435 of the Supreme  
9 Court's opinion. It was talking about Dr. McClay's  
10 (ph) methodology for demonstrating impact -- or I'm  
11 sorry -- demonstrating damages.

12 THE COURT: Well what he said was it  
13 didn't match the liability theory.

14 MR. COE: Correct, Your Honor. So what  
15 the Supreme Court said is, and I'll start to read  
16 here:

17 "This methodology might have been  
18 sound and might have produced  
19 commonality of damages if all four of  
20 those alleged distortions remain in  
21 this case."

22 So all four of those theories of impact  
23 if they had stayed in the case Dr. McClay's  
24 methodology might have worked.

25 The court goes on to say --

1 THE COURT: No, there were four  
2 separate theories of damages in Comcast.

3 MR. COE: Four theories of impact, Your  
4 Honor, correct. Four --

5 THE COURT: But that's --

6 MR. COE: -- causes of prices going up,  
7 Your Honor.

8 THE COURT: All in the eyes of the  
9 plaintiffs unlawful.

10 MR. COE: Correct, Your Honor.

11 THE COURT: And you're analogizing  
12 those four theories of -- you're saying antitrust  
13 impact. You're saying that they're analogous to  
14 market structure, cost --

15 MR. COE: I am, Your Honor. Because --

16 THE COURT: -- and demand?

17 MR. COE: And here's what -- maybe I'll  
18 skip forward to all I was going read -- but I think  
19 the key point of this passage is that they walk  
20 through what the Third Circuit said that -- the third  
21 circuit said:

22 "At the class certification stage  
23 we do not prior plaintiffs tie each  
24 theory of impact to an exact  
25 calculation

1 of damages."

2 THE COURT: Yes, but the plaintiffs are  
3 only offering one theory of impact.

4 MR. COE: I'll keep reading, Your  
5 Honor.

6 "But such assurances are not  
7 provided by a methodology that  
8 identifies damages that are not the  
9 result of the wrong."

10 And that's the key sentence here.  
11 That's from the Supreme Court. You are only entitled  
12 to damages tied to the wrong. The only piece of the  
13 damages here that are tied to the wrong are on this  
14 top yellow block, this cartel activity. Ortho had  
15 nothing to do with demand going up, cost going up,  
16 market structure changing. The only thing that even  
17 possibly could be tied to this theory of harm is that  
18 additional amount that was caused by this alleged  
19 cartel activity.

20 Going on from this opinion --

21 THE COURT: Isn't that what Dr. Beyer  
22 has done, although you criticize the way he did it, in  
23 his but for world?

24 MR. COE: He has, Your Honor, because  
25 he has not accounted for two of the three major



1 variables that determine price.

2 So for the Immucor cost benchmark he's  
3 taking all the increase that was the result of the  
4 market structure and making that damages, he's taking  
5 all of the price increase that was a result of  
6 increased demand and making that damages.

7 And let me read one more passage, Your  
8 Honor.

9 THE COURT: That's not what was going  
10 on in Comcast and Sprint. As I understand it Judge  
11 Padova and I were working on those opinions at about  
12 the same time. I don't know how his got out ahead of  
13 mine, I think maybe our hearing was later, but the  
14 issues had been framed, and I don't recall us ever  
15 talking about market structure, cost, and demand.

16 MR. COE: They didn't use those words,  
17 Your Honor, I don't want to suggest that.

18 THE COURT: Well they used there were  
19 four separate theories of damages -- or I don't want  
20 to confuse damages and antitrust impact asserted in  
21 Comcast and Behrend -- and the Supreme Court said that  
22 the theory of liability did not match those theories -  
23 - all of those theories of damages.

24 MR. COE: But why was that, Your Honor?  
25 And the reason for that is that -- and this is a

1 quote:

2 "Prices use level above what an  
3 expert deems competitive has been  
4 caused  
5 by factors unrelated to an accepted  
6 theory of antitrust harm are not  
7 anticompetitive in any sense relative  
8 here."

9 And then the court goes on to quote the  
10 federal judicial center's reference manual and  
11 scientific evidence, which says:

12 "The first step in a damages study  
13 is the translation of the legal theory  
14 of the harmful event into an analysis  
15 of  
16 an economic impact of that event."

17 And I think that ties over to our  
18 discussion here, Your Honor. Because the point is  
19 you're only entitled to damages that are related to  
20 the harm, and here because of Dr. Beyer's unscientific  
21 and unreliable methodology he's giving damages to  
22 plaintiffs that are not related to the cartel.

23 As Your Honor said and at the first  
24 class certification opinion, prices are going to go up  
25 in a duopoly regardless of whether there's collusion

1 or not or whether there's cartel activity or not.

2 Well Ortho -- that increase in price is not the result  
3 of the cartel activity, and plaintiffs --

4 THE COURT: So what you're saying is  
5 his but for prices have to take into consideration  
6 lawful price increases and separate out only those  
7 price increases which are due to cartel activity.

8 MR. COE: That's exactly right, Your  
9 Honor.

10 THE COURT: How would that be done?

11 MR. COE: If he had used scientific  
12 methodology and accounted for all three major  
13 variables he wouldn't be able to do that.

14 THE COURT: Tell me how that would have  
15 been done.

16 MR. COE: He would have, for example,  
17 in the operation to create value benchmark, first of  
18 all he would have started with a more reliable  
19 methodology for estimating the impact of duopoly, but  
20 we'll leave that one alone for the moment. He starts  
21 with that 25 percent price increase per year. He  
22 would have had to add on top of that a factor for the  
23 increase in price because of the influence of  
24 increases in cost, and then he would have added on top  
25 of that another addition for the increase in demand.

1                   So basically he would have had to take  
2   that but for price and increase it two times because  
3   he had only -- he started the market structure but  
4   ignored cost and demand, he would have had to take it  
5   up two more times to get to a but for price that was  
6   the price that would have existed in a competitive  
7   market without cartel activity.

8                   THE COURT: And that's what he said he  
9   was doing, you're saying he didn't.

10                  MR. COE: Yes, Your Honor.

11                  THE COURT: There must be an answer to  
12   that, but I can't think of it right now.

13                  MR. COE: I'm sure you'll come up with  
14   it, Your Honor.

15                  I'm not going to spend -- it's been a  
16   long day, so I'm not going to spend too much time on  
17   this, but I think the two of us quibbled a little bit  
18   about whether prices actually flattened out in the  
19   second half of the class period. This was Dr. Beyer's  
20   chart to show that they continue to go up, but I think  
21   you can see that certainly --

22                  THE COURT: Which --

23                  MR. COE: This is -- I'm sorry --

24                  THE COURT: I see it.

25                  MR. COE: -- slide 39, Your Honor.

1 THE COURT: No, I think it's -- it  
2 looks -- yes, it is -- it's 39.

3 MR. COE: We cherry picked a product on  
4 slide 40 that shows that for this product at least  
5 there were no increases in cost in the second half of  
6 the class period.

7 I think the numbers that probably are  
8 most useful to the Court are the ones that we showed  
9 earlier in Dr. Bronstein's class cert presentation  
10 that showed this three to six percent kind of average  
11 cost increase over the second half of the class  
12 period.

13 We're finally getting to one of the  
14 first questions Your Honor asked. What about this  
15 inconsistency between Dr. Beyer's treatment of costs  
16 in the first half of the class period and his  
17 treatment of costs in the second half of the class  
18 period? So we have two quotes, Your Honor, to  
19 illustrate this tension. And the first bullet is --

20 THE COURT: You're --

21 MR. COE: This is -- I'm sorry, Your  
22 Honor --

23 THE COURT: -- at slide 41?

24 MR. COE: -- it's slide 41.

25 THE COURT: 41 I think.

1 MR. COE: So the first bullet is from  
2 paragraph 54 of Dr. Beyer's reply report, and that's  
3 when he's talking about his operation to create value  
4 benchmark that he used for the first half of the class  
5 period. And he says, "Cost and demand did not  
6 influence the price of traditional blood reagents."

7 Now he hasn't done a scientific study  
8 to demonstrate that, he's taken some quotes out of  
9 context, and one of those is this quote from Bill  
10 Weiss (ph), who's an Immucor employee, and all he said  
11 was, "Costs -- increases in costs did not fully  
12 explain the increases in price."

13 So -- and I don't think we're arguing  
14 today that these whatever number you want to say  
15 prices increased was entirely caused by increases in  
16 costs, but we are arguing that they were a substantial  
17 factor in those increases in costs that should have --

18 THE COURT: What about Dr. Bronstein,  
19 we talked about him this morning, and his statement  
20 that Dr. Beyer was entirely correct in excluding cost  
21 from his benchmark for the first period we're  
22 addressing?

23 MR. COE: That's not correct, Your  
24 Honor. What -- all that Dr. Bronstein said was that  
25 Dr. Beyer was correct in ignoring Ortho's standard

1 cost data. Dr. Bronstein opined -- criticized Dr.  
2 Beyer for failing to account for cost in the first  
3 half of the class period.

4 THE COURT: Where is that?

5 MR. COE: I'm sure we could get you a  
6 cite on that, Your Honor.

7 THE COURT: No, it's -- I've got it  
8 here at least twice. Mr. Corrigan, where is it in  
9 your -- I think it's day one or is it day two? But  
10 that's not the whole -- I have Bronstein's testimony.  
11 Or Liz, did you take it back?

12 THE CLERK: You have it.

13 THE COURT: No, I think --

14 (Clerk confers with the Court)

15 MR. CORRIGAN: Your Honor, it's slide  
16 23 in today's presentation.

17 THE COURT: I have the whole thing.  
18 That's not what he said, Mr. Coe. Not what he said.  
19 The question:

20 "Q What was the basis of  
21 Dr. Beyer's conclusion that he wasn't  
22 going rely on Ortho's cost data?

23 A There was information  
24 provided from Ortho that they  
25 characterized costs from time to time -

1 -

2 they recharactered costs from time to  
3 time and as a result the cost data that  
4 you had requested wouldn't be

5 comparable

6 from your year.

7 Q So would that be unreliable  
8 data for the purposes Dr. Beyer was  
9 seeking it?"

10 And the answer:

11 "I would say he made the right  
12 decision in not using Ortho's cost  
13 data,

14 yes. No reference to standard cost,  
15 reference to cost data."

16 MR. COE: You're right, Your Honor, we  
17 had that conversation this morning, but you know,  
18 it's --

19 THE COURT: But you --

20 MR. COE: -- not clear if he's talking  
21 about standard costs or actual costs, but --

22 THE COURT: Well the language is clear.  
23 And what you're saying is there's room for wiggling,  
24 and --

25 MR. COE: Well not really, Your Honor.



1 If we turn to page 195 of Dr. Bronstein's transcript.

2 THE COURT: All right. Tell me where?

3 MR. COE: Just doing something quickly.

4 So Dr. Beyer -- this was the direct examination -- I'm  
5 sorry, the direct examination of Dr. Bronstein, and  
6 start at line 4 I asked Dr. Bronstein:

7 "Q You've been talking about  
8 Dr. Beyer's failure to account for a  
9 duopoly market structure, which was the  
10 first of the three factors. I want to  
11 turn now to the second factor, which is  
12 cost production, was the second of the  
13 three economic factors that influenced  
14 price. Does Dr. Beyer account for cost  
15 changes when he predicts prices for the  
16 first five years of his damages  
17 period?"

18 Dr. Bronstein's response was:

19 "No, he's ignoring cost entirely.  
20 The only fact that he considers he is  
21 25  
22 percent price increase from the OCB  
23 business plan."

24 Next question:

25 "Q How do you know that the

1 OCB

2 business plan didn't account for  
3 increases in cost?

4 A When you read the OCB  
5 business plan the assumptions that are  
6 embodied in the plan and one of the  
7 assumptions is is that they assume the  
8 prices are fixed."

9 THE COURT: Prices are fixed or cost?

10 MR. COE: It should be cost, Your  
11 Honor. Line 20 my next question is:

12 "Q Do you know what was  
13 actually happening to the cost during  
14 the first five years of Dr. Beyer's  
15 damages period?

16 A Yes, I have some data that  
17 Dr. Beyer produced in the second report  
18 that illustrates this."

19 And asked him to walk through the  
20 slide, and that's the slide that we showed earlier  
21 with the Immucor standard cost data percentage  
22 increases throughout the class period.

23 So, I'll skip forward through his  
24 discussion because essentially this next colloquy is  
25 his description of that slide.

1 THE COURT: But then he goes on to say  
2 Dr. Beyer was correct in ignoring costs.

3 MR. COE: That's not correct, Your  
4 Honor. He was saying Dr. Beyer was -- let me go to  
5 line 15 at page 196.

6 THE COURT: "If Dr. Beyer had accounted  
7 for these cost increases in his benchmark for the  
8 first five years of the damages period how would that  
9 have changed his analysis?" And then he says, "well  
10 since Dr. Beyer used a 25 percent" -- well I won't  
11 read it all. What it says is, is it would have added  
12 to the percentage, it would be up to 34 percent per  
13 year so that he would have but for prices rising by up  
14 to 59 percent instead of 25 percent. I don't quite  
15 understand that arithmetic. But in any event the but  
16 for prices would be up.

17 MR. COE: Right. And then going to  
18 1997, Your Honor, I asked Dr. Bronstein, "what reason"  
19 -- this is line 7:

20 "What reason did Dr. Beyer give  
21 for

22 ignoring cost during the first five  
23 years of the damages period?"

24 And Dr. Bronstein said:

25 "The reason he gave was the

1 argument that cost didn't account for  
2 100 percent of the price increases that  
3 we see across the entire class period."

4 Then I asked him, "Does that  
5 explanation make sense?" And the response is:

6 "It doesn't make sense to me as an  
7 economist. Just because changes in

8 cost

9 don't explain 100 percent of the

10 changes

11 in price this is not a factor that an  
12 economist would feel comfortable in  
13 ignoring in his analysis, particularly  
14 when you see cost changes that are as  
15 significant as the ones that Dr. Beyer  
16 has calculated here."

17 So what Dr. Bronstein said is, Dr.  
18 Beyer can ignore costs, but in accounting for cost he  
19 agrees that Dr. Beyer couldn't use Ortho standard cost  
20 data to account for those.

21 THE COURT: I don't think he says that.  
22 He says:

23 "There was information provided by  
24 Ortho that they recharacterized cost  
25 from time to time and as a result the

1 cost data -- it says date -- that you  
2 had requested wouldn't be comparable  
3 from year to year."

4 MR. COE: And, Your Honor --

5 THE COURT: And then he goes onto say -  
6 -

7 MR. COE: -- getting back to the --

8 THE COURT: -- "I made the right  
9 decision -- he made the right decision in not using  
10 the cost."

11 I don't think the two are inconsistent.  
12 I think if he had been provided with what could have  
13 been described as accurate cost data that didn't --  
14 that wasn't recharacterized that would have been  
15 entirely different. Then I think the first part of  
16 the and deposition transcript, 195, 96, and 97 --  
17 excuse me -- would have come into play. But in any  
18 event it's an explanation for what was intended.

19 MR. COE: Well, I don't want there to  
20 be any confusion there, Your Honor, I think that  
21 testimony was pretty clear from Dr. Bronstein that in  
22 his opinion Dr. Beyer should have accounted for cost  
23 in the first half of the class period.

24 THE COURT: I disagree. I think the  
25 first part of the testimony was clear standing alone,

1 but when matched with the cross I think there's a  
2 question, and I don't have to pick the part that  
3 favors one side or the other, I have to determine  
4 whether there's evidence to support something that was  
5 done, and I think the statement by Dr. Bronstein on  
6 page 245 is damaging.

7 MR. COE: Well, Dr. Bronstein didn't  
8 challenge Dr. Beyer's use of Immucor's standard costs  
9 for Immucor, and Dr. Beyer could have at least used  
10 Immucor's standard costs of account for standard  
11 costs --

12 THE COURT: Arguably, yes. Yes.

13 MR. COE: -- in the first half of the  
14 class period.

15 THE COURT: Yes, that's an argument,  
16 but don't we have here have competing benchmark  
17 issues?

18 MR. COE: We don't, Your Honor. What  
19 we have is a data problem, and I think we've cited  
20 some cases in our briefs that if you don't have the  
21 data that doesn't excuse you from applying an  
22 unscientific methodology. The Lauman (ph) case and  
23 there was also an Eastern District case from Judge  
24 Schiller that we cited as well, Your Honor.

25 THE COURT: Okay.

1 MR. COE: So let's get to this second  
2 statement.

3 So in the first half of the class  
4 period he says I can ignore cost and demand. But in  
5 the second half of the class period he says:

6 "Costs -- using only costs  
7 accounts

8 entirely for changes -- not only  
9 accounts for changes in price due to  
10 changes in costs, but also fully  
11 accounts for the market structure."

12 And if you go back to Dr. Beyer's reply  
13 report where he makes this statement, at paragraph 56.

14 THE COURT: We have that somewhere.  
15 It's exhibit -- let me see. Oh, here it is. Let me  
16 turn to 56. All right.

17 MR. COE: So Dr. Beyer says, this is in  
18 paragraph 56:

19 "Dr. Bronstein claims I did not  
20 control for market structure after  
21 2004;

22 however, by allowing price to change by  
23 the same percentage as cost I am in  
24 fact

25 controlling for market structure. The

1 ability to pass through cost increases  
2 is in direct contrast with how the  
3 traditional reagents market operated  
4 prior to the beginning of the class  
5 period when there is intense  
6 competition

7 and an inability to increase price as  
8 cost rose."

9 So the first point I want to make, Your  
10 Honor, is he cites nothing in support of the  
11 statement. This is --

12 THE COURT: He cites footnote 118.

13 MR. COE: And you can read that, Your  
14 Honor, it has nothing to do with his statement --

15 THE COURT: Yes, it --

16 MR. COE: -- in that sentence. Well it  
17 does, but it certainly isn't any authoritative support  
18 for that conclusion.

19 And going back to slide 41, which is  
20 basically just this same statement, it's a logical  
21 fallacy, Your Honor, that just because Ortho couldn't  
22 pass along all of its cost in a competitive market  
23 doesn't mean that when it was in a duopoly it would be  
24 limited to just passing along costs.

25 And we'll -- as we pointed out in your



1    briefs, Your Honor, Dr. Beyer and the plaintiffs have  
2    not pointed to a single example of another expert in  
3    any other case using this cost pass through  
4    methodology or any court in any other case accepting  
5    this cost pass through methodology. And one of Your  
6    Honor's tasks in evaluating this methodology is to  
7    apply Daubert, and we'll get to these Daubert factors,  
8    Your Honor.

9                    And as I'm sure Your Honor is aware  
10    there's eight of them that are set forth -- and this  
11    is slide 42, Your Honor -- in the Helcot (ph) decision  
12    of the Third Circuit. And on the left-hand side I  
13    have four. And your slide might look different, Your  
14    Honor, because we have what we call an animation in  
15    the slide, so it'll eventually match up with your  
16    slide, but we're going to start in a different place.

17                    So these factors that I have currently  
18    listed on the left-hand side whether it's peer  
19    reviewed, whether their standard is governing the  
20    technique, whether it's related to reliable methods,  
21    whether it's ever been put to a non-judicial use,  
22    plaintiffs do not address any of those factors in  
23    their brief, so they all weigh in Ortho's favor.

24                    They do address the second set of four  
25    factors in the right-hand column to start. The first

1 one is, is it a testable hypothesis. Well plaintiffs  
2 admit it cannot be tested at page 12, footnote 42 of  
3 their brief, so that moves over to Ortho's column,  
4 Your Honor.

5 The next factor they address is the  
6 rate of error, and plaintiffs claim that another  
7 expert could repeat Dr. Beyer's methodology to  
8 ascertain its accuracy, and they cite to Your Honor's  
9 opinion in the Smulo v. Hafer (ph) case, and that's  
10 very distinguishable. In that case the expert had  
11 conducted interviews that the defendant's challenged,  
12 and the Court said that, well another expert could  
13 have done that and reconducted all those interviews to  
14 see if there were any errors.

15 Well here we have Dr. Beyer's  
16 construction of a hypothetical but for world. There's  
17 no way for anyone -- another expert to go back and see  
18 whether this was consistent with actual results,  
19 because we don't have this hypothetical but for world.  
20 So we would argue that that factor does not weigh in  
21 plaintiff's favor either, Your Honor.

22 I'm going to come back to generally  
23 accepted in a minute.

24 The next one I'll talk about is  
25 expert's qualifications, and I think we've both said

1 in all of our points on Dr. Beyer's experience and  
2 qualifications we obviously have argued that his  
3 experience is a mixed bag at best. We would argue  
4 that that weighs in Ortho's favor as well.

5 So we're left with only one factor that  
6 plaintiff's argue supports Dr. Beyer's use to this  
7 cost pass through methodology, and in order to support  
8 that argument they cite to this article from two  
9 European economists, Van Dyke (ph) and Verboven, and I  
10 have a copy of this for the Court, Your Honor.

11 (Pause)

12 MR. COE: So, Your Honor, I just handed  
13 up a copy of an article from issues and competition  
14 under policy law by Theon (ph) Van Dyke and Frank  
15 Verboven entitled, "Quantification of Damages," and  
16 this is the article that plaintiffs cite in their  
17 brief to support the article that Dr. Beyer's use of  
18 this cost pass through methodology is generally  
19 accepted. And the discussion of this methodology is  
20 in page 2336, Your Honor.

21 The first point I want to make, Your  
22 Honor, is that Dr. Beyer did not cite this article in  
23 his report so we don't know that he actually did apply  
24 this cost pass through method, and I'll talk -- give  
25 you two examples of why it's questionable that he did.

1           The other point on that is, you know,  
2 we had not have a chance to cross-examine Dr. Beyer  
3 with this document because we just got it in  
4 connection with the reply remand brief, Your Honor.

5           So the first point I wanted to point  
6 out is this comment under the cost mark-up method, it  
7 says:                           "This method involves  
8 collecting

9                           information on production costs and  
10                          estimating the competitive price on the  
11                          basis of some measure of cost per unit  
12                          plus a mark up for reasonable profit."

13           So this mark up for reasonable profit  
14 is the first example of Dr. Beyer's failure to explain  
15 -- or to apply this methodology in accordance with  
16 this article. Dr. Beyer doesn't mention this  
17 reasonable profit mark up in his discussion of the  
18 Immucor cost benchmark.

19           Second, the second highlights portion  
20 says:

21                           "Cost data are typically derived  
22                          from the accounting systems or  
23                          management information systems of the  
24                          companies involved; however, attention  
25                          should be given to the fact that

1                   accounting cost data are not the same  
2    as  
3                   economic cost data."

4                   And then it gives an example here of  
5    why they might be different. And again, Dr. Beyer  
6    doesn't discuss how he's -- whether he's accounted for  
7    this fact that the standard cost data, for example, is  
8    the accounting cost data, not the cost data the  
9    economic -- an economist could use.

10                  So we would say that's the second  
11    example of Dr. Beyer to apply this methodology as set  
12    forth in this article.

13                  But the last point, and the one that I  
14    think is most important, is this sentence that we have  
15    highlighted on the screen, and it's actually in this  
16    last paragraph, I've highlighted the second sentence.  
17    It says:

18                         "In utilizing this method one must  
19                         keep in mind that the but for world may  
20                         be characterized by imperfect  
21                         competition and that the non-collusive  
22                         price may be well above both long-run  
23                         marginal and average cost."

24                  And that's the key sentence, Your  
25    Honor. This method only works in a competitive

1 market, in a perfectly competitive market. But that's  
2 not what we have here. We have a duopoly. And as the  
3 Court already found on page 241 of its opinion,  
4 "Market consolidation tends to increase prices even in  
5 the absence of coordinated conduct." And these two  
6 authors of this article agree with that. They say if  
7 there's imperfect competition the non-collusive price,  
8 the price that has nothing to do with cartel activity,  
9 may be well above the cost.

10 So this method does not separate out  
11 the difference between market structure's influence on  
12 price and cost influence on price, it only looks at  
13 costs. It does not account for market structure as  
14 Dr. Beyer has argued.

15 And we've already gone through the  
16 Comcast decision that we cite in support for that  
17 comity to separate out or account for each one of  
18 these factors separately, Your Honor.

19 And this is a fifth problem under  
20 Daubert. This methodology might be useful in another  
21 case where there was perfect competition, but that's  
22 not what we have here, we have a duopoly, imperfect  
23 competition. So this methodology cannot be used to  
24 estimate but for prices here.

25 So we would argue that the -- for all

1 the reasons I just cited this generally accepted  
2 factor is also in Ortho's favor, Your Honor.

3 Just one more point on the fit, as the  
4 Supreme Court said in Daubert, "Just because a method  
5 is valid for one purpose does not mean that it's valid  
6 for all purposes." That's page 591 of the Supreme  
7 Court's Daubert opinion, Your Honor.

8 One last quick point on cost -- Immucor  
9 cost, and we've talked about Dr. Beyer's use of  
10 Immucor's cost as a proxy for Ortho's cost, and this  
11 is a slide from -- I'm on slide 45, Your Honor, of our  
12 presentation.

13 Oh, one more point on this article,  
14 Your Honor. Plaintiff's counsel also said that this  
15 article says Dr. Beyer does not need to account for  
16 demand, and I read through this discussion and I did  
17 not see that comment. I'm sure plaintiff's counsel  
18 will point it out to you, but I could not find it,  
19 Your Honor.

20 So back to slide 45. This is a page  
21 from that operation to created value presentation from  
22 December 29th, 1999, which is Ortho Exhibit 18, it's a  
23 very heavy document so we've just taken out this one  
24 page. And if I could approach, Your Honor, this at  
25 least shows the difference in Ortho's costs and

1 Immucor's costs prior to the beginning of the class  
2 period in 1999.

3 THE COURT: But this is not for -- it  
4 says ABO reagents, they're not traditional blood  
5 reagents.

6 MR. COE: They are, Your Honor, and --  
7 there's -- generally ABO reagents are the reagents  
8 that are used for testing blood type. So whether  
9 you're A, B, or O type blood, so those are --

10 THE COURT: Oh, I'm with you.

11 MR. COE: -- a subcategory of  
12 traditional reagents.

13 THE COURT: What was I think of, the  
14 other --

15 MR. COE: Automated or --

16 THE COURT: Automated.

17 MR. COE: -- or IBNTS.

18 THE COURT: All right. Thank you for  
19 telling me what I was think of.

20 MR. COE: So this is just an example of  
21 one product that's Ortho's anti-A product that's  
22 compared to Immucor's product. And in the slide  
23 Norbridge is pointing out the basis of analysis  
24 Norbridge did that Ortho's costs are much different  
25 than Immucor's costs. So its raw material costs



1 appear to be this \$4 plus packaging plus \$47 for  
2 ingredients as compared to Ortho only apparently paid  
3 -- or I'm sorry -- Immucor only paid 3.60 for  
4 packaging and \$30 for ingredients. So you have about  
5 \$33 as compared to \$51.

6 And then on the bottom they separately  
7 break out labor and overhead, and Ortho's labor and  
8 overhead to make this product as \$32, and Immucor's is  
9 only \$12, or Ortho's is almost three times Immucor's  
10 cost just for labor and overhead.

11 And as Dr. Bronstein opined, this is  
12 important, because the fact that the companies had two  
13 different cost positions at the beginning of the class  
14 period suggests that their costs weren't the same,  
15 that they were influenced by different factors. And  
16 this is at pages 200 to 201 of the hearing transcript.  
17 And he also pointed to some other things that changed  
18 over time that were different between Ortho and  
19 Immucor.

20 Dr. Beyer's response to this criticism  
21 was that he used Immucor's crosses of proxy because  
22 Ortho's cost data was not available and said that "he  
23 could use it as a proxy because both companies had  
24 similar raw materials and were subject to the same  
25 regulatory environment."

1 Well if that was true, Your Honor, then  
2 why were Immucor -- or I'm sorry -- Ortho's costs, raw  
3 ingredient costs so much higher than Ortho's at the  
4 beginning of the class period? And if the regulatory  
5 requirements were so similar why are Ortho's labor and  
6 overhead costs so much higher than Immucor's?

7 Dr. Beyer didn't do anything to verify  
8 his conclusory statements. When told in this letter  
9 that the categories of standard cost changed over time  
10 he didn't ask for my additional data. He used that as  
11 an excuse to use this proxy. And under Daubert  
12 Dr. Beyer is required to have good grounds for his  
13 opinions. And we would cite Your Honor's opinion in  
14 the Robinson v. Hartzell case in support of that  
15 standard. Page 16 of the decision in Lexis.

16 He doesn't have any back up for this  
17 statement, it's not the testimony of a scientist, Your  
18 Honor. He hasn't done his home work just like Dr. --  
19 I'm sorry -- Mr. Corrigan accused Dr. Bronstein of,  
20 and he doesn't have good grounds for his opinions, and  
21 that's not enough under Daubert, and that's why we  
22 would argue that those Immucor cost benchmark should  
23 be rejected, Your Honor.

24 And I'll move on to RhoGAM, which I  
25 believe is the last topic. Slide 42, please. Nope,

1 that's wrong. Sorry, Your Honor, we're at slide 47.

2 (Pause)

3 MR. COE: So the first argument we  
4 wanted to respond to, Your Honor, was plaintiff's  
5 argument that Your Honor had already ruled on this  
6 issue, so we've excerpted a couple of statements from  
7 Your Honor's opinion that we think express some doubt  
8 or that at most Your Honor was conducting a  
9 preliminary assessment, which is no longer adequate  
10 after the Third Circuit's blood reagents opinion.

11 You know, one of these comments, Your  
12 Honor, was that you were not entirely persuaded by  
13 Dr. Beyer's explanation. As I'm sure Your Honor knows  
14 in Hydrogen Peroxide the Third Circuit said that at  
15 the class certification stage the court does need to  
16 be persuaded and the court should not suppress any  
17 doubt about expert testimony. And that's on pages 321  
18 and 323 of that opinion, Your Honor.

19 This comment that you did not need to  
20 reject RhoGAM at the certification stage and it could  
21 evolve to become admissible evidence suggests that  
22 maybe the Court applied some kind of focused or  
23 limited Daubert inquiry like the -- in the Zern (ph)  
24 case that plaintiffs cite and also that the Third  
25 Circuit cited in the Blood Reagents opinion.

1           The reason that the Zern court said it  
2 was appropriate to do this more targeted inquiry is  
3 because there was still a significant amount of  
4 discovery to be done in that case. Here plaintiffs  
5 have admitted that discovery is essentially closed  
6 where they've got all the documents they want, so I  
7 don't think there's any reason for Your Honor to apply  
8 anything less than the full Daubert inquiry at this  
9 hearing, Your Honor.

10           Your Honor had also asked whether -- I  
11 think to start off yesterday whether Daubert applied  
12 to the question of whether Dr. Beyer chose an  
13 appropriate yardstick, and we'd cite the Lofal (ph)  
14 case where that court rejected the yardstick that was  
15 proposed in that case under the -- on a Daubert  
16 ruling, Your Honor, in response to a Daubert motion.

17           So there's a couple ways that Daubert  
18 comes in here. The first point is, you know, an  
19 expert's opinion must be based on sufficient facts or  
20 data. So if he does not have a reliable yardstick --  
21 if he hasn't found a comparable yardstick market his  
22 opinion is not based on reliable facts or data.

23           Another requirement is that the -- he  
24 has to apply principals and methods reliably to the  
25 facts of the case.

1                   So we're not arguing, Your Honor, that  
2   an expert can never use a yardstick, we're just saying  
3   the yardstick that Dr. Beyer selected in this case was  
4   not comparable or was not a fair congener to the  
5   traditional blood reagents market, Your Honor.

6                   And plaintiffs have thrown that Lofal  
7   case back in our face a few times and that fair  
8   congener statement, but I think it's worth pointing  
9   out that the court in Lofal rejected the yardstick  
10   because it was not comparable to the market at issue.

11                   The next slide is one -- page 48, Your  
12   Honor, and this is another one that you've already --  
13   this is the one you've already seen today, and this is  
14   a comparison of actual prices to the prices -- to the  
15   price of Ortho's RhoGAM product. And I don't think  
16   there can be any argument that the price of RhoGAM was  
17   flat during the second half of the class period, and  
18   we'll explain why that is in a minute. Plaintiffs  
19   have argued that the increases in the traditional  
20   blood reagents market were the result of collusion,  
21   but we would certainly argue, and Dr. Bronstein has  
22   argued, that that's the result of price leadership,  
23   not collusion, Your Honor.

24                   So, I have one more article I wanted to  
25   hand up, Your Honor, this is another one that Dr.

1 Beyer cites in his report.

2 THE COURT: Thank you.

3 (Pause)

4 MR. COE: So, Your Honor, this is the  
5 article that Dr. Beyer cites in his first report when  
6 he talks about the yardstick method, he relies on this  
7 article by Dr. Rubenfeld to say that -- to agree that  
8 the cost competition and demand in the yardstick  
9 market in the market at issue must be similar is what  
10 Mr. Beyer actually says. But if you turn to page 4 of  
11 this article, Your Honor, and for the record this is  
12 an article by Dr. Rubenfeld entitled, "Antitrust  
13 Damages," dated November 21st, 2009. And I'm turning  
14 to page 4. What Dr. Rubenfeld actually says is:

15 "Ideally the comparable market  
16 product should reflect the same degree  
17 of competition, the same costs, and the  
18 same demand conditions that would have  
19 prevailed in the market at issue had  
20 there been no wrongful behavior."

21 That's our first bullet. But of course  
22 that's not always going to be possible. So what do  
23 you do if they're not the same? And that's the second  
24 bullet here or in the next sentence we have  
25 highlighted.

1                    "If an appropriate yardstick is  
2                    available it is important to take into  
3                    account any differences in costs and  
4                    the  
5                    extent of competition between the  
6                    yardstick market and the market at  
7                    issue  
8                    in the but for world."

9                    So you can pick a yardstick that has  
10                  slightly different cost, demand, and competition  
11                  factors, but you need to account for those  
12                  differences. Well how do you do that? That's what  
13                  the next bullet and the next highlight addresses, Your  
14                  Honor, it says:

15                  "Regression analysis offers one  
16                  tool that can be useful in a yardstick  
17                  analysis.

18                  To illustrate suppose that there  
19                  are available price data in the market  
20                  at issue in the yardstick market,  
21                  suppose also the yardstick market and  
22                  the market at issue are both  
23                  differentiated product markets subject  
24                  to (indiscernible) and computation;  
25                  however, the yardstick market has fewer

1                   firms and a lesser degree of  
2 competition  
3                   among those firms, then a regression  
4 analysis relating price in the  
5 yardstick  
6 market to one or more measures of the  
7 degree of competition could allow one  
8 to  
9 predict what prices in the yardstick  
10 market would be when the degree of  
11 competition was the same in the market  
12 at issue."

13                   Now we're going to walk through, Your  
14 Honor, why competition, cost, and demand were all  
15 different in the traditional blood reagents market and  
16 the RhoGAM market, and Dr. Beyer has done nothing to  
17 try and account for those differences. He's ignored  
18 those differences, Your Honor.

19                   Going backwards, Your Honor, to  
20 slide 49.

21                   (Pause)

22                   MR. COE: So plaintiffs and Dr. Beyer  
23 argue that this difference in two and three  
24 competitors was not significant, and we think the best  
25 evidence of that -- the significance of that



1 difference is what actually happened to RhoGAM prices  
2 when the number of competitors in the Rho-D market  
3 changed.

4                   So as Ms. Kleinbard walks through in  
5 her declaration there's -- the first significant event  
6 was in the mid-1990s, Your Honor, we have a box in the  
7 slide that talks about the FDA's implementation of  
8 this viral removal process which resulted in a  
9 significant expense for the manufacturers of these  
10 Rho-D products, a number of those manufacturers went  
11 out of business as a result, they could not invest  
12 this additional cost that would have been required to  
13 comply with these FDA requirements. So this went from  
14 a competitive market in the 1990s to a duopoly by the  
15 year 2000.

16                   And what happened to price when the  
17 market shifted from a competitive market to a duopoly?  
18 The prices went from \$15.17 to -- in the early 1990s -  
19 - and actually I think that price is from 1997, Your  
20 Honor, to \$79.14 in 2000. And Ms. Kleinbard explained  
21 in her affidavit that this is actually the prices  
22 charged to one customer, Premier, which is this GPO  
23 you've heard about, because they don't have this  
24 average price data going back to the 1990s, Your  
25 Honor.

1                   So what's the next -- and then I should  
2 point out, Your Honor, that prices continue to  
3 increase through 2003. So from 2000 and 2003 the  
4 price went -- this Premier price, which probably would  
5 have been a lower price because Premier was the GPO  
6 with some bargaining power, but regardless this --  
7 from the Premier price to the average price there was  
8 an increase to \$82.59.

9                   Well what was the next significant  
10 event in this market? It was the entry of a third  
11 competitor on February 12th, 2004, and this was the  
12 competitor that offered this Rhophylac product and it  
13 changed names over the course of this time period,  
14 Your Honor, from ZLB to CSL, so I think that's why you  
15 saw in  
16 Dr. Beyer's report he said ZLB/CSL.

17                   So this time period does not appear on  
18 the slide we showed you earlier, slide 48, when the  
19 RhoGAM price is flat, because that price has flattened  
20 out after 2004 because there was additional  
21 competition in the Rho-D market, there were three  
22 competitors instead of two.

23                   Now as you've heard Dr. Beyer disputes  
24 that and says effectively there are only two  
25 competitors in the Rho-D market in the second half of

1 the class period, which is this 2006 to 2010 time  
2 period. Mr. Corrigan talked about that at some  
3 length.

4 Two reasons -- and the reason he gave  
5 for that is because Talecris did not actively compete  
6 in the hospital channel.

7 So to give a little more background  
8 Rho-D is definitely -- is typically marketed in two  
9 channels. To hospitals because it's given to pregnant  
10 women in the hospital, or it's marketed to  
11 gynecologists, some of them administer this drug in  
12 their office. This is a drug that has to be  
13 administered twice during pregnancy to prevent the  
14 death of children, Your Honor.

15 So let's talk first about this opinion  
16 that this hospital channel was somehow separate from  
17 this OBGYN channel where apparently Dr. Beyer thinks  
18 Talecris competed.

19 Well as we cited to Your Honor the  
20 courts require an economist who's going to opine on a  
21 separate market to actually do independent economic  
22 analysis. And we've cited the Third Circuit's opinion  
23 in U.S. Horticultural Supply versus Scotts in our  
24 brief, an example of a court rejecting an opinion on  
25 product market because the expert had not done any

1 independent economic analysis.

2 Well what's the economic analysis that  
3 experts apply? It's this snip test, Your Honor. The  
4 significant -- small but significant non-transitory  
5 increase in price test, and that's the test that the  
6 antitrust enforcement agencies apply -- I'm sorry, I'm  
7 on slide 50, Your Honor. It's in the 2010 Department  
8 of Justice and FTC horizontal merger guidelines, we  
9 also have a citation to a New Jersey case that applied  
10 this test, and even Dr. Beyer in the context of  
11 explaining why he thinks he didn't -- he did not need  
12 to take into account automated reagents in this case,  
13 says that the reason he didn't is because that was --  
14 there was no -- that was a separate market under this  
15 snip test, Your Honor. But he didn't apply that test  
16 there -- this test here, instead he just points to  
17 Ms. Kleinbard's testimony, and that's not a sufficient  
18 basis for his opinion under the case law, Your Honor.

19 But more importantly we would argue  
20 that he mischaracterized Ms. Kleinbard's testimony.  
21 And first I want to pull out the excerpt that  
22 plaintiffs played for you.

23 (Pause)

24 MR. COE: This is page 33 of  
25 plaintiff's slide, Your Honor.

1 (Pause)

2 MR. COE: And what I want to point out  
3 in this testimony, Your Honor, is the first question  
4 is:

5 "Q You were U.S. Product  
6 director from June 2001 to December of  
7 2003, correct?

8 A That is correct.

9 Q So during that time frame  
10 you  
11 were only competing with BayRho-D in  
12 the  
13 RhoGAM market."

14 So this entire line of questioning and  
15 testimony, Your Honor, is about this 2001 to 2003 time  
16 period, which is before Dr. Beyer uses RhoGAM as a  
17 benchmark for traditional blood reagents prices.

18 So we would argue that none of this  
19 testimony is relevant to Your Honor's assessment of  
20 whether RhoGAM is an adequate yardstick, because it  
21 doesn't apply to the time period when Dr. Beyer is  
22 using it as a yardstick.

23 So we'll play another excerpt from  
24 Ms. Kleinbard's testimony, and even reading this  
25 excerpt, Your Honor, essentially what Ms. Kleinbard

1 testifies to is that Bayer at the time, it hadn't been  
2 acquired by Talecris yet, was the low cost provider.  
3 They competed by offering the lowest price. And I  
4 think that's a pretty well accepted method of  
5 competition, Your Honor. Ms. Kleinbard says they  
6 didn't spend a lot of money on marketing because they  
7 were trying to get the lowest price.

8 But let's listen to what she said, and  
9 I think you'll see that she describes during the time  
10 period we're talking about the market as a three-  
11 competitor market, and again says that Talecris  
12 competed by offering the lowest price.

13 (Video Played)

14 MR. COE: So how do they compete, Your  
15 Honor? By offering the lowest price.

16 Now if you picked up on it, Your Honor,  
17 in the beginning of that excerpt she mentioned that  
18 Bayer sold this business line to a company called  
19 Talecris, which is actually owned by a private equity  
20 firm, in April of 2005. So it doesn't really make any  
21 sense that this firm would pay to buy this line of  
22 business from Bayer and then not actively compete, and  
23 that's certainly not consistent with the record.

24 In response to the testimony we pulled  
25 up one document, I'm not -- that was not in our

1 slides. Joshu, could you pull up Kleinbard Exhibit  
2 10?

3                   So this is a marketing plan -- an Ortho  
4 marketing plan for RhoGAM from 2008, Your Honor, which  
5 is actually dated October 2007. As we talked about  
6 Ortho typically made its business plans months before  
7 the year in question. This document obviously is  
8 relevant to what the competition was like in the  
9 market in the period of time when Dr. Beyer is using  
10 RhoGAM as a yardstick.

11                   And we turn to page 5 of this document.  
12 And Joshu, I'm going ask you to just highlight BayRho-  
13 D now HyperRho-D. So this is where they're walking  
14 through the competitors in this market, and one of  
15 these competitors is BayRho-D, they had actually --  
16 Talecris when it acquired the product line from Bayer  
17 changed the name to HyperRho-S/D, but it's essentially  
18 the same product, Your Honor. And it says and they  
19 had recently received approval for latex reclaim, so  
20 in other words they're investing money to try and get  
21 a different use of their product. No major changes to  
22 price or promotion strategy.

23                   If you could turn to page 7. This is  
24 where Ortho walks through what they call the  
25 competitive landscape. And again, they include --

1 they actually include four competitors, one only  
2 having three percent of the market, but again, the  
3 second firm listed is Talecris.

4 What's their market strategy? Compete  
5 on price to protect market share.

6 The last column, acquired former  
7 business from Bayer, old brand name was BayRho-D. So  
8 they had to invest some money in changing the brand  
9 name.

10 And the last page I'll show you this  
11 document is page 10, Your Honor. This is a slide from  
12 this presentation where they walk through the  
13 strengths, weaknesses, opportunities, and threats for  
14 HyperRho-S/D or Talecris. I'm sure Your Honor has  
15 seen this type of document in other cases, essentially  
16 measuring the competitive threat from this company.

17 So why would Ortho spend time putting  
18 together an assessment of the threat from this company  
19 if it wasn't a competitor in this market?

20 THE COURT: And what is the exhibit  
21 we're -- we've been looking --

22 MR. COE: This the Kleinbard Exhibit  
23 10, Your Honor.

24 THE COURT: And -- have you seen it  
25 before? I don't think we've seen it.



1 MR. COE: This was submitted with our  
2 original class cert brief in 2012, Your Honor. As  
3 Mr. Corrigan mentioned, Ms. Kleinbard submitted an  
4 affidavit, along with a number of exhibits, Your  
5 Honor.

6 THE COURT: Yes.

7 MR. COE: If you go back to slide 51.  
8 And, Your Honor, this is -- now turn to slide 51 of  
9 our presentation.

10 THE COURT: Yes.

11 MR. COE: And the -- what we have on  
12 the left is the cover page or the first page of this  
13 document, then we've pulled out paragraph 71 to 73,  
14 and what this is a 2009 CSL, the Rhophylac  
15 manufacturer announced that it was acquiring Talecris,  
16 including obviously this BayRho-D product line. So  
17 the number of competitors in the Rho-D market was  
18 going to go from three competitors to two competitors,  
19 and the FTC challenged that merger. And this is an --  
20 this is the FTC's explanation -- or description of the  
21 Rho-D market in 2009, Your Honor, during this period  
22 when Dr. Beyer proposes to use RhoGAM as a yardstick.

23 So turning to paragraph 71 first of all  
24 it describes it has a three competitor market, and  
25 goes on to say, "The market will be significantly more

1 concentrated and less competitive with the elimination  
2 of the Talecris as an independent competitor." And  
3 Talecris is the competitor that Dr. Beyer says didn't  
4 compete, had nothing to do with prices in this market.

5 Turning to paragraph 72 the FTC further  
6 alleges, "Since their entry into this market in 2004  
7 CSL and Talecris have competed aggressively with one  
8 another as the only two low price suppliers of Rho-D."

9 And finally paragraph 73 we have  
10 highlighted as following the merger CSL Talecris would  
11 be less likely to have engaged in competitive pricing.

12 So the FTC challenged this merger because  
13 they believe there was a significant difference  
14 between three competitors and two competitors.

15 (Pause)

16 MR. COE: So that's -- that was all  
17 about the first of the three factors, Your Honor, and  
18 the competition between the two markets from  
19 Dr. Rubenfeld's article, and again going back to this,  
20 because the competition was different in the Rho-D  
21 market and the traditional blood reagents market  
22 Dr. Beyer should have accounted for that difference in  
23 some way.

24 Let's move on to the other two factors,  
25 cost and demand that we've said from the beginning are

1 the important variables that determine price.

2 Ms. Kleinbard in declaration points out  
3 a number of differences between the RhoGAM business  
4 and the traditional blood reagents business that would  
5 result in different costs and different demands.

6 Well the first one actually goes back  
7 to the competition, Your Honor. RhoGAM had two  
8 competitors as opposed to the traditional reagents  
9 business obviously only had one competitor. This is  
10 slide 53, Your Honor.

11 Second, RhoGAM is a pharmaceutical and  
12 subject to more stringent regulatory requirements than  
13 traditional blood reagents, and that would obviously  
14 result in higher costs.

15 Three, demand for Rho-D products or  
16 RhoGAM was determined by birthrate. On the other hand  
17 demand for traditional reagents is determined by the  
18 number of blood transfusions, as we've talked about  
19 earlier.

20 Fourth, RhoGAM's primary raw material  
21 was obtained from donors at a donor center that Ortho  
22 ran in Buffalo and they used these same donors year  
23 after year to get this plasma they needed, and as a  
24 result of that Ms. Kleinbard said the costs for RhoGAM  
25 were stable from 2005 and 2005. And as we've talked

1 about, the traditional blood reagents costs increased  
2 during that period of time.

3 And then finally the RhoGAM business  
4 was much more profitable than the traditional blood  
5 reagents business. And as Dr. Bronstein opined at  
6 pages 21 and 22 of his report, the fact that the  
7 profits are different shows that the prices of RhoGAM  
8 and traditional blood reagents are enclosed by  
9 different cost and demand factors, Your Honor.

10 So turning to the next slide, what was  
11 Dr. Beyer's response to these differences? Did he do  
12 anything to control for them? No.

13 So first of all he says -- he admits he  
14 did not analyze RhoGAM cost data in his report, and  
15 that's from paragraph 58, footnote 124.

16 He makes another one of his conclusory  
17 statements in paragraph 63, he says there's difference  
18 in regulations, there's difference between the  
19 regulation that a pharmaceutical company would be  
20 under as opposed to Rho-D manufacturers was  
21 immaterial, but this statement is not supported by a  
22 citation to anything in the record or any research.

23 Three, Dr. Beyer does not talk about  
24 RhoGAM demand or volume data in his report. Instead  
25 he makes the conclusory statement that Rho-D and

1 traditional blood reagents markets were stable. Well  
2 in this last bullet we point out that even Dr. Beyer  
3 admits there was a difference in demand. And this may  
4 venture into a discussion we had yesterday, but he  
5 says that demand for Rho-D was increasing at 0.8  
6 percent per year and the demand for traditional blood  
7 reagents was increasing at two to three percent per  
8 year.

9                   Now, I've done the math here to extend  
10 it over the class period to show that even though that  
11 looks like a fairly small difference if you're looking  
12 at a ten-year period that could be significant, but  
13 either way Dr. Beyer made no effort to analyze any  
14 data on demand to actually see whether this had  
15 influence on price or whether this difference was  
16 significant as you're required to do to use the  
17 yardstick methodology as Dr. Rubenfeld explains.

18                   So what does he come back to? Well he  
19 comes back to the same place he came back to when he  
20 was talking about the operation to create value  
21 benchmark. He says, "I don't need to account for cost  
22 and demand because competition in the Rho-D market is  
23 what drove price, not cost and demand." And as we've  
24 explained that's not a satisfactory answer. Just  
25 because cost and demand don't entirely explain price

1 doesn't mean you could ignore them. But leaving that  
2 aside there are two problems with his statement.

3 The first is that the levels of  
4 competition were different in the Rho-D market than  
5 the traditional blood reagents market. So by him  
6 saying that the cost -- I'm sorry -- the price is  
7 determined by competition he's essentially admitting  
8 he needs to throw out RhoGAM as a yardstick.

9 Second even if -- I've already said  
10 this I guess -- but even if cost and demand are not  
11 the sole determinants of price, as Dr. Bronstein  
12 opined, they must be accounted for.

13 Dr. Beyer fails to account for any of  
14 these three determinants of price -- differences in  
15 any of these three determinants of price, market  
16 structure, cost, and demand, and his failure to  
17 adequately to account for any of these variables  
18 renders his RhoGAM yardstick inadmissible, Your Honor.

19 THE COURT: Thank you.

20 MR. CORRIGAN: Your Honor, I'm not sure  
21 if you're scowling at me, I hope not, but --

22 THE COURT: No, I'm not.

23 MR. CORRIGAN: Okay. I understand it's  
24 late in the day. Could we take a -- well let me just  
25 ask would I -- could I be allowed to respond briefly?

1                   THE COURT: Yes. I think what I'd like  
2 to do, because there's one issue that Mr. St. Antoine  
3 raised, and that is what happens if for any reason I  
4 decide that Beyer does not meet the requirements of  
5 Daubert, can the plaintiff's side prove antitrust  
6 impact by evidence common to the class? That was an  
7 issue that you raised on -- or yesterday.

8                   MR. ST. ANTOINE: Yes, Your Honor.

9                   THE COURT: In your introduction. And  
10 we have to talk about that briefly.

11                   Why don't we take a very brief recess,  
12 mainly because I've got so many exhibit books piled on  
13 my lap I can barely move.

14                   MR. CORRIGAN: Your Honor, when we come  
15 back from recess should I respond and then discuss the  
16 Court's question about Beyer surviving Daubert or do  
17 you want to do that first or how do you want to  
18 proceed?

19                   THE COURT: I'll leave that to you.  
20 You're given an opportunity to -- no -- oh, no, let's  
21 continue with the last part of the proceeding and then  
22 get to what happens if I scrap Dr. Beyer's report.

23                   MR. CORRIGAN: Thank you, Your Honor.

24                   THE COURT: So we're in recess for ten  
25 minutes.

1 THE BAILIFF: All rise.

2 (Recessed at 5:19 p.m.; reconvened at 5:34 p.m.)

3 THE COURT: Be seated everyone. We'll  
4 wait for --

5 UNIDENTIFIED SPEAKER: I think he gave  
6 up, Your Honor.

7 THE COURT: I think we should --

8 UNIDENTIFIED SPEAKER: It might move  
9 things along, Your Honor.

10 (Laughter)

11 THE COURT: Wait 'til you hear what I  
12 have to say.

13 UNIDENTIFIED SPEAKER: Apologize, Your  
14 Honor.

15 THE COURT: No, that's fine.

16 UNIDENTIFIED SPEAKER: I'm juggling the  
17 exhibits as are you.

18 THE COURT: Well, I put mine off to the  
19 side, but I have a new one.

20 UNIDENTIFIED SPEAKER: Uh-oh.

21 THE COURT: The Third Circuit just  
22 handed down a decision which bears on Mr. Coe's very  
23 words. They've handed down a decision in Neo versus  
24 Valbolon (ph), I'm sure you followed it, it's a New  
25 Jersey case. It was argued in June, it's certainly on



1 a faster track than this case. They've explained  
2 their interpretation of Comcast and Behrend in the  
3 Supreme Court this way:

4 "Because the evidence could not  
5 translate the relevant legal theory of  
6 the harmful event, the liability issues  
7 into an analysis of the economic impact  
8 of that event the Court determined that  
9 common questions could not  
10 predominate."

11 Citing the judicial center manual to  
12 which you referred. I'm looking at page 44 of the  
13 slip opinion. We haven't read it completely.

14 All right. Mr. Corrigan --

15 MR. CORRIGAN: Thank you, Your Honor.

16 THE COURT: -- I think you should  
17 respond to each of the issues raised, but in  
18 particular --

19 MR. CORRIGAN: Your Honor, I think it's  
20 going to be a hodgepodge.

21 THE COURT: Well, I certainly want to  
22 hear from you on the use of damages.

23 MR. CORRIGAN: Your Honor, if I might I  
24 wanted to respond to what Mr. Coe said first and  
25 then --

1 THE COURT: He said this too. I'm  
2 talking about don't forget I want to hear from you on  
3 the article --

4 MR. CORRIGAN: Okay.

5 THE COURT: -- that appeared in --  
6 issues in competition on policy, particularly with  
7 respect to the type of market structure required for  
8 use of this method and specifically the statement that  
9 the method only works with competition, does not  
10 account for where a market -- where an opinion --

11 MR. CORRIGAN: Your Honor --

12 THE COURT: Well let me just read my --  
13 I can't even read my notes. There's no accounting for  
14 a market structure in a duopoly. No fit says this  
15 article.

16 MR. CORRIGAN: I'm sorry, Your Honor,  
17 what article is that?

18 THE COURT: The one -- the first one to  
19 which Mr. Coe referred.

20 MR. CORRIGAN: Is that the one that was  
21 called quantification of damages?

22 THE COURT: Exactly.

23 MR. CORRIGAN: Okay.

24 THE COURT: All right. You may proceed  
25 in whatever order you deem appropriate.

1 MR. CORRIGAN: All right. Your Honor,  
2 I'm looking at a cell phone here. It's shorted out on  
3 me again.

4 I just want to -- just because it's  
5 been a little unclear I just want to read to the Court  
6 our initial interrogatory to Ortho on costs.

7 "List -- on A list all costs both  
8 actual and estimated and standard and  
9 non-standard associated with the  
10 production, sales, and marketing of  
11 blood reagents."

12 So we do what we generally do, we ask  
13 for everything and then it becomes a dialogue, but to  
14 say we didn't ask for it is not right.

15 THE COURT: Well, I don't -- I don't  
16 think the defense quite said that.

17 MR. CORRIGAN: They may not have quite  
18 said that, Your Honor, I just wanted to make it clear.  
19 That's been talked about --

20 THE COURT: No, I've been under the  
21 impression, based on what you said, that you asked for  
22 cost data and they gave you what they gave you, but  
23 they explained it.

24 MR. CORRIGAN: I'm not sure that's  
25 correct, Your Honor.

1 THE COURT: Well they certainly  
2 explained in the letter that Mr. St. Antoine sent you.

3 MR. CORRIGAN: Well --

4 THE COURT: They differentiated between  
5 standard costs, and it appears that the data that they  
6 send you made specific reference to standard costs.

7 MR. CORRIGAN: Yeah, it's -- I can't  
8 speak to the colloquy, Your Honor, because I'm not --  
9 it's been a long time, but it's highly unlikely that  
10 we are told there's a bunch of costs that are not  
11 coming to you and we say we're not interested in  
12 those. That's just generally not how it works.

13 Now, I do want to talk about one  
14 other --

15 THE COURT: Well what was the reply to  
16 the letter?

17 MR. CORRIGAN: I don't -- I just don't  
18 recall, Your Honor. I don't recall, but what I do  
19 recall is that we asked for all costs.

20 THE COURT: That could have really sent  
21 a red flag up. I'm putting myself in the position of  
22 a litigant -- lawyer for a litigant. I receive a  
23 letter like that and it appears I'm getting some of  
24 the costs but not all of them. I either want an  
25 agreement that we don't use these costs or I want

1 these quote non-reliable costs. I would certainly  
2 have asked for that.

3 MR. CORRIGAN: Well we did send up a  
4 red flag and Dr. Bronstein agrees that the red flag  
5 was correct, that we didn't use Ortho's costs. They  
6 were unreliable, we didn't use them, and Dr. Bronstein  
7 agrees that was the proper course.

8 THE COURT: Well we don't have to redo  
9 that argument.

10 MR. CORRIGAN: We won't, Your Honor.

11 THE COURT: I --

12 MR. CORRIGAN: That would be one place  
13 where I don't redo.

14 THE COURT: I'm on top of that  
15 argument. I haven't decided it yet.

16 MR. CORRIGAN: Your Honor, I do want to  
17 put up a slide that relates to something that Mr. Coe  
18 just put up. Can I get footnote 124? And if we could  
19 blow that up.

20 Now Mr. Coe just put up on one of his  
21 slides in regarding the RhoGAM market he's referenced  
22 footnote 124 in Dr. Beyer's report, then he glossed  
23 over it and said Dr. Beyer said he didn't analyze the  
24 costs. But I'm not sure what slide it was. The  
25 slides were coming pretty quickly, Your Honor. Let me

1 see.

2 THE COURT: Yes. Well, I'm sure it's  
3 at the end of the --

4 MR. CORRIGAN: It's towards the end.

5 THE COURT: Yes.

6 MR. COE: It's the last one, Your  
7 Honor.

8 THE COURT: It's slide 54 and it refers  
9 to Dr. Beyer's report paragraph 58, note 124.

10 MR. CORRIGAN: Yes. And the first  
11 bullet point says, "Dr. Beyer did not analyze RhoGAM  
12 cost data in his report." And Mr. Coe referenced that  
13 and just said --

14 THE COURT: Yeah.

15 MR. CORRIGAN: -- he just said he  
16 didn't analyze it. But what he didn't say was the  
17 first sentence in that footnote. "Ortho has not  
18 produced cost data for RhoGAM."

19 Here we are back to the point, Ortho  
20 doesn't produce the cost data and then intends to use  
21 it on the offensive. Okay? They don't produce the  
22 cost data and then they say Beyer hasn't done anything  
23 with the cost data. They didn't produce it. This has  
24 been a game of smoke and mirrors with the cost from  
25 the get go.

1 THE COURT: Was that requested?

2 MR. CORRIGAN: Yes, it was requested.

3 This -- RhoGAM came up later on in the process when we  
4 identified it as a benchmark.

5 THE COURT: Well if cost data is  
6 required in the analysis and it's not produced,  
7 whether because it doesn't exist or because the  
8 defense is stonewalling, what's your position with  
9 respect to a Beyer opinion that excludes cost data?

10 MR. CORRIGAN: Our opinion is that we  
11 meet the standard. We have good grounds, they're fair  
12 congeners. We cited a --

13 THE COURT: Even though there's a lack  
14 of evidence?

15 MR. CORRIGAN: Well they don't have to  
16 be perfect substitutes, they have to be relative -- I  
17 can't remember -- relative -- I can't remember the  
18 quote, Your Honor, I'm getting punchy, but they have  
19 to be close. They don't have to be similar on every  
20 single point. We cited a large number of -- a long  
21 list of -- a long laundry list of points on where they  
22 are similar. Do they have to be similar to every  
23 point especially when the cost data we don't have as a  
24 result of the defendant not producing it? They don't  
25 have to be -- the standard is not that they have to be

1 identical on every single point. They have to be fair  
2 congeners, and I think we've given enough evidence  
3 that they are, including on the market structure.

4 The Court was not entirely satisfied in  
5 the initial opinion and we've tried to go beyond that  
6 and cite testimony on RhoGAM from Ms. Kleinbard.

7 There were a few other points --

8 THE COURT: The problem with the  
9 Kleinbard evidence is that it stopped before the  
10 period at issue in your use of the RhoGAM.

11 MR. CORRIGAN: Well several points that  
12 were made. Ms. Kleinbard was -- she was employed --  
13 she was -- she showed up with a large declaration on  
14 RhoGAM, and the declaration she showed up with was not  
15 just from all (indiscernible), she also had a  
16 position --

17 THE COURT: Was she a 30(b)(6) witness?

18 MR. CORRIGAN: No, she wasn't. I asked  
19 the same question today. She wasn't, but again, she  
20 showed up with a large declaration of RhoGAM, so  
21 effectively she was Ortho's RhoGAM expert.

22 THE COURT: But she had not handled  
23 RhoGAM according to her affidavit after 2003.

24 MR. CORRIGAN: Well her affidavit -- I  
25 just had it. She also had a position in the RhoGAM



1 market from '05 to '08, but her declaration cites  
2 documents that don't stop at '03. The documents that  
3 Dr. Beyer cites in the paragraph I put up before  
4 showing market share drop from '03 to '07.

5 Now Mr. Coe pointed out that at some  
6 point there was a sale from Bayer to Talecris in '04,  
7 but the point where market share is going down is from  
8 '03 to '07, that covers the period when both companies  
9 owned that.

10 The first paragraph of her declaration,  
11 "From June '05 to December '08 I was worldwide product  
12 director for the RhoGAM brand." So she didn't just  
13 stop her involvement with RhoGAM in '03, her own  
14 declaration --

15 THE COURT: It was just that the  
16 document that Mr. Coe -- well he didn't reference the  
17 document, you offered it.

18 MR. CORRIGAN: Yes.

19 THE COURT: And she described herself  
20 as out of the RhoGAM business in 2003. Read that back  
21 -- read that again, please.

22 MR. CORRIGAN: She says:

23 "In June 2001 to December 2003 I  
24 was U.S. Product director for Ortho's  
25 RhoGAM brand. From June 2005 to

1 December 2008 I was the worldwide  
2 product director for the RhoGAM brand."

3 So she's RhoGAM -- she's up there to  
4 talk about RhoGAM not the specific --

5 THE COURT: The latter point was not  
6 included in the -- part of the affidavit that you  
7 offered -- or the statement -- I guess it was her  
8 testimony.

9 MR. CORRIGAN: It was her testimony,  
10 Your Honor. Now she was talking about it in an  
11 earlier time frame, but again, the market share  
12 dropped that Dr. Beyer got not just from her  
13 testimony, but from documents in her declaration were  
14 from '03 to '07.

15 Now another document, I think it was  
16 slide 34 in Mr. Coe's presentation, one of the points  
17 that was made in there in terms of Bayer and Talecris,  
18 it says, "No major changes to the price and promo  
19 strategy."

20 THE COURT: I don't think it was 34.  
21 The RhoGAM exhibits were --

22 MR. COE: Just to clarify the record,  
23 it wasn't in the slides, Your Honor, it's Kleinbard  
24 declaration Exhibit 10 is the --

25 MR. CORRIGAN: Okay.

1 MR. COE: -- document Mr. Corrigan is  
2 referring to.

3 THE COURT: Thank you.

4 MR. CORRIGAN: In Kleinbard Exhibit 10  
5 then there was talk of no major changes to the price  
6 promo strategy. According to Ms. Kleinbard's  
7 testimony their promo strategy was nothing. No promo.  
8 So if there's no change in the promo strategy there's  
9 no change.

10 Now the other thing that was in --  
11 again, it was the document Mr. Coe cited where there  
12 was four squares, the threats, weaknesses. In the  
13 lower right-hand corner of that under the threat,  
14 aggressive pricing by ZLB, which is what we said. ZLB  
15 was the new competitor and they came in and they  
16 aggressively priced, whereas Bayer and Talecris,  
17 according to Ms. Kleinbard, basically their strategy  
18 was nothing.

19 THE COURT: What about the FTC --

20 MR. CORRIGAN: Well the FTC -- again,  
21 it was -- I was kind of looking at this on the fly,  
22 but there was one document that kind of stuck out that  
23 made by list. Paragraph 72 of the FTC document, and  
24 Mr. Coe again highlighted the part that said basically  
25 that Bayer and ZLB were aggressively competing, but

1 the part he didn't highlight was that Ortho had stayed  
2 out of the fray.

3 So even in that instance he's  
4 signifying -- he's highlights the two of the three  
5 that are competing and the FTC document itself says  
6 Ortho stayed out of the fray. Even that document  
7 shows that only two of the three were competing, but  
8 they were citing to that.

9 So again, as Dr. Bronstein said, three  
10 firms is a label. Two or three or one, it's a label.  
11 It's not an insignificant factor, we're not saying  
12 it's no factor, what we're saying is it's part of the  
13 analysis, the other part is what are those  
14 participants doing? And we saw from that, that's a  
15 highly concentrated market. Only three players. Why  
16 is there no price increases there? It's competition.  
17 It's not that there's three, it's not that there's two  
18 or there's ten, whoever is in that market is  
19 competing, and it's quite obvious from the TBR market  
20 whoever is in that market is colluding, at least not  
21 competing. Okay?

22 Now one other thing that Mr. Coe said,  
23 he said that Dr. Bronstein opined that that market --  
24 that that graph doesn't show conspiracy, it shows  
25 duopoly pricing, passive collusion. But Dr. Bronstein

1 is the one that didn't read the conspiracy evidence.  
2 It's very easy to say that that's the result of  
3 passive collusion when you haven't read the collusion  
4 evidence. It makes it much, much easier to have that  
5 opinion.

6 THE COURT: No, I don't remember that.  
7 What I do recall is argument that there can be -- I  
8 think I referred to it a conscious parallelism and  
9 Mr. Coe brought that into the duopoly context. And  
10 what's that phrase? The duopoly phrase for conscious  
11 parallelism?

12 MR. ST. ANTOINE: We've used price  
13 leadership or even tacit collusion at places, Your  
14 Honor.

15 THE COURT: Yes, I think it was both of  
16 those. Thank you. Thank you, Mr. St. Antoine.

17 MR. COE: He does that often, Your  
18 Honor.

19 MR. CORRIGAN: Your Honor, at the merit  
20 stage we'll have to prove it was conspiracy versus  
21 passive collusion or duopoly pricing or something. I  
22 just made note that Dr. Bronstein is the one opining  
23 that it's tacit collusion or conscious parallelism  
24 when he never read the conspiracy evidence. That  
25 makes it so much easier to hold that opinion.

1 THE COURT: I don't think he said  
2 that's what it was, I think he said you could have it  
3 in a duopoly.

4 MR. CORRIGAN: I thought he said that  
5 that's what it was, but I could be wrong, Your Honor.  
6 Either way Dr. Bronstein is not exactly in a great  
7 position to opine on what it is when you haven't read  
8 the conspiracy evidence.

9 Your Honor, a couple of points. I do  
10 want to address that article. It's interesting that,  
11 you know, in this Daubert world that we read the  
12 article exactly the opposite of how Mr. Coe reads it.  
13 It says -- the paragraph he talked about says, "In  
14 utilizing this method one must ..." -- I'll let you  
15 get to it, Your Honor.

16 THE COURT: I'm there.

17 MR. CORRIGAN: Page -- the paragraph  
18 starts with, "The cost per unit ...," and I'm reading  
19 the second sentence.

20 THE COURT: Yes.

21 MR. CORRIGAN: "In utilizing this  
22 method one must keep in mind that the but for world  
23 may be characterized by imperfect competition." We  
24 read that to say that this model is applicable in a  
25 duopoly. I mean --

1 THE COURT: Wait a minute, I don't --  
2 on what page are you?

3 MR. CORRIGAN: I'm on page 2337.

4 THE COURT: All right. Okay. It's the  
5 last sentence that's highlighted. Go ahead.

6 MR. CORRIGAN: Yeah, that second  
7 sentence, "The but for world may be characterized by  
8 imperfect competition."

9 So Mr. Coe and Mr. St. Antoine  
10 yesterday said that basically this doesn't apply to a  
11 duopoly, it only applies to a competitive marketplace.  
12 But to be frank, we read that in exactly the opposite  
13 way, that the but for world involving this cost market  
14 method can be used with imperfect competition, which  
15 means duopoly. So it is applicable to a duopoly.  
16 That's how we read it.

17 Now to say that a but for world --

18 THE COURT: Let me read that again.

19 MR. CORRIGAN: Okay.

20 (Pause)

21 THE COURT: All right.

22 MR. CORRIGAN: I mean to suggest that a  
23 but for world has to have perfect competition is kind  
24 of ludicrous. Most price fixing conspiracies involve  
25 oligopolies of some sort, so you're never -- you're

1 almost never, but we don't know of any case --

2 THE COURT: Going to have perfect --

3 MR. CORRIGAN: -- when you're modeling  
4 a but for world there's perfect competition. It's  
5 never that. Or I shouldn't say it's never that, Your  
6 Honor, it's rarely that. Usually it's in a  
7 marketplace that's conducive to collective behavior.  
8 So that even in the but for world it's not perfect  
9 competition.

10 Now the other point, and I may have  
11 slightly misspoken, I said that there was something in  
12 this report that said you didn't need demand. What I  
13 meant was --

14 THE COURT: You didn't need, I'm sorry?

15 MR. CORRIGAN: You didn't need demand,  
16 demand didn't have to be factored into method. So  
17 what I said was slightly off. What I should have said  
18 and what I meant was in a mark up, okay, when a mark  
19 up is constant as this is in this approach, when a  
20 mark up is constant over time that means no demand,  
21 it's not going with the flow of demand, it's a  
22 constant mark up over time. So implicit in this type  
23 of methodology it assumes there's no demand.

24 So that's what I have on this article,  
25 Your Honor, and we read it in exactly the opposite



1 way.

2 THE COURT: And now I'm reading it  
3 again, that last sentence -- next to the last  
4 sentence.

5 "In utilizing this method one must  
6 keep in mind that ..." -- well you have  
7 to read the two sentences together.

8 "The cost per unit of production ..." -  
9 -

10 it's the first sentence -- "plus a  
11 reasonable profit mark up are then  
12 taken

13 as an estimate of the competitive  
14 price."

15 And then the next sentence, the one  
16 we're talking about:

17 "In utilizing this method one must  
18 keep in mind that the but for world may  
19 be characterized by imperfect  
20 competition and that the non-collusive  
21 price may be well above both long run,  
22 marginal, and average cost."

23 MR. CORRIGAN: Your Honor, we've  
24 submitted this article to basically say that there's  
25 good grounds for this methodology. Perfect? No,

1 probably not, but it doesn't have to be. There's  
2 economic literature that shows that this is an  
3 accepted methodology, and we read it in exactly the  
4 opposite way so that this would be an accepted  
5 methodology in the type of duopoly case that -- the  
6 duopoly/conspiracy case that we have here. And we  
7 think it shows good grounds under Daubert.

8 A couple of points, Your Honor, on the  
9 Daubert, and we've read a number of opinions by this  
10 Court on Daubert, so we know you're well familiar with  
11 it. I did want to cite one quote from the Robinson  
12 case, it's an '07 case.

13 THE COURT: You keep referring to  
14 Robinson, that was an aircraft case I believe.

15 MR. CORRIGAN: You're right, it was.  
16 It was an aircraft case.

17 THE COURT: It was almost as difficult  
18 to resolve as this one.

19 MR. CORRIGAN: That's unfortunate, Your  
20 Honor.

21 THE COURT: Well it was difficult  
22 because the standard to be applied was an air crash  
23 case resulting in serious injuries. The standard  
24 under the Third Circuit law was the regulations of the  
25 federal aviation board and the FAA regulations were to

1 form the basis of the charge to the jury. And the FAA  
2 regulations were about three inches thick and they  
3 were never designed for that purpose. The Third  
4 Circuit had ruled on a case called Abdula (ph), that  
5 that's the law that must be applied.

6 We were here on the Saturday morning  
7 with someone who now features rather prominently in  
8 the investigation and follow up of -- well it has to  
9 do with Temple and the board share and the spokesman  
10 for --

11 MR. CORRIGAN: I have some idea I might  
12 know what you mean, Your Honor.

13 THE COURT: -- and the bottom line.  
14 Now you've brought all of that back to me. I can see  
15 --

16 MR. CORRIGAN: Oh, I'm sorry.

17 THE COURT: -- I can see this room  
18 filled. We were here on a Saturday morning and the  
19 now chairman of the board decided he would treat us  
20 all to Dunkin' Donuts, and there must have been 20 of  
21 us at work on Saturday trying to put together a  
22 charge.

23 The case was settled fortunately for me  
24 before I had to instruct the jury.

25 Thank you for reminding of Robinson

1     versus Hartzell.

2                   MR. CORRIGAN:  No, Your Honor, don't  
3     hold that against me too much, please.

4                   THE COURT:  I think Hartzell was the  
5     propeller manufacturer, but wow.

6                   MR. CORRIGAN:  Uh-huh.

7                   THE COURT:  All right.  Now tell me  
8     what lesson you learned from Hartzell.

9                   MR. CORRIGAN:  Maybe I ought not  
10    mention that, but --

11                  THE COURT:  What was the year --

12                  MR. CORRIGAN:  -- I guess the damage  
13    has been done, right?

14                  THE COURT:  Just out of curiosity how  
15    long ago was that?

16                  MR. CORRIGAN:  It's '07.

17                  THE COURT:  Okay.

18                  MR. CORRIGAN:  So right around the  
19    corner.  I just pointed to one thing where the --

20                  THE COURT:  No, it was -- Mr. Coe is  
21    nodding, it was not your year.

22                  MR. COE:  I was involved in that case  
23    many years earlier, Your Honor, in 2003.

24                  THE COURT:  Yes, because your year was  
25    the year of three Harvard clerks and I recall that the

1 clerk in that case came from Columbia.

2 MR. COE: I believe I helped you with  
3 the earlier summary judgment opinion in that case,  
4 Your Honor.

5 THE COURT: Go ahead.

6 MR. CORRIGAN: Okay. One point, it's  
7 page 9. I'm sorry. Finally this court:

8 "New England asserts that  
9 Dr. McSwain's (ph) proposed testimony  
10 does not fit the fact of the case.  
11 Specifically New England argues that no  
12 evidence supports Dr. McSwain's  
13 conclusions that it overhauled or  
14 performed any work in the area of the  
15 propeller to fail.

16 The Court rejects this assertion.  
17 And here's the quote:

18 "Dr. McSwain is permitted to base  
19 his opinion on a particular version of  
20 disputed facts and the weight to be  
21 accorded to that opinion is for the  
22 jury."

23 That's what we have here. Disputed  
24 facts, okay? Dr. Beyer has -- we've shown evidence  
25 that his version of the facts is certainly not off

1 base, but even if there's a dispute on the facts he  
2 can still have good grounds.

3 THE COURT: Well what you're quoting  
4 from Robinson is certainly good law. That's not  
5 exactly what we're talking about here.

6 MR. CORRIGAN: Not exactly, but I think  
7 that he's on more solid grounds than that, but I just  
8 thought the disputed of facts kind of pointed that to.

9 Your Honor, a couple of -- just a  
10 moment on the Elcock factors. As this Court is well  
11 familiar with the case law, Elcock included, says that  
12 the eight Elcock factors, which are the -- actually  
13 eight Daubert factors, they're not exhausted, they're  
14 not exhausted in any case, it's not necessary to apply  
15 them in every case, that the district court has  
16 discretion not only to find testimony admissible but  
17 how to find it admissible.

18 And the Mitchell case is instructive on  
19 them. Mitchell has some interesting language. They  
20 say that the gatekeeper is not the only protector of  
21 the castle, and in fact the other protection of the  
22 castle is what this Court has referenced several times  
23 today, cross-examination. Dr. Beyer has been cross-  
24 examined twice in this case at class cert.

25 THE COURT: Yes. And do you really

1 think this comment is helping me? I mean I focused on  
2 that, I've made reference to that time and time again,  
3 that I have to decide.

4 MR. CORRIGAN: Yes. But we're just  
5 saying -- Mr. Coe used a screen on the Elcock factors  
6 and we're just says that this Court has discretion.

7 In the Avonguard (ph) case, we cite  
8 that on page 2 of our reply memo on remand.

9 THE COURT: Is that my Avonguard case?

10 MR. CORRIGAN: Yes, and that's one from  
11 April. I hope that wasn't as unpleasant of an  
12 experience as the Robinson case was.

13 THE COURT: No, that's still very much  
14 around.

15 MR. CORRIGAN: Oh, okay.

16 THE COURT: I think it's in my trial  
17 pool.

18 MR. CORRIGAN: Okay.

19 THE COURT: If you're familiar with it  
20 you might want to accept it has an amicus or  
21 something.

22 MR. CORRIGAN: Well we'll see how we do  
23 on this case, Your Honor. We'll see if my opinion  
24 makes any difference to you based on this case.

25 We quote some language from Avonguard

1 and we insert Dr. Beyer, but here Dr. Beyer, and the  
2 quote is, "A particular methodology in rendering his  
3 opinions as opposed to merely relying on his own  
4 intuition." Okay? The proposed methodology based on  
5 the expert, I won't say -- the expert's quote:

6 "Review of the relevant parts of  
7 the record, his professional background  
8 and experience and his review of  
9 numerous materials in his field, and  
10 thus his opinions weigh on good  
11 grounds."

12 And that's the standard. It doesn't  
13 have to be perfect. They don't have to agree with  
14 him. Even the Court doesn't have to agree with him,  
15 it just has to be good grounds. And all of what Dr.  
16 Beyer has been on the good grounds.

17 Your Honor, one more point, I'm going  
18 to read your opinion one more time and I'm trying to  
19 select a portion that doesn't necessarily deal with  
20 Dr. Beyer, and this is the Court opining on an issue  
21 the Court is somewhat familiar with, which is case  
22 law.

23 THE COURT: What --

24 MR. CORRIGAN: It is --

25 THE COURT: -- page?



1 MR. CORRIGAN: -- page 243.

2 THE COURT: I'm there.

3 MR. CORRIGAN: In Section 1 -- I'm  
4 sorry -- Section I, common proof versus individualized  
5 proof.

6 THE COURT: I'm there.

7 MR. CORRIGAN: You go about three  
8 quarters of the way down and it's a sentence starting,  
9 "What Ortho proposes ..."

10 THE COURT: I have it.

11 MR. CORRIGAN: Okay. It says, "What  
12 Ortho proposes ..." -- and this is jumping around a  
13 little bit, but this gets on the single price, Your  
14 Honor.

15 "What Ortho proposes would  
16 exponentially complicate the  
17 calculation of damage ins this type of  
18 case. As Dr. Beyer testified it would  
19 require plaintiffs to estimate almost a  
20 million different but for prices."

21 And here's the part:

22 "Ortho has not -- has cited for  
23 case and the Court has found none in  
24 which plaintiffs were required to do  
25 this.

1                   In contrast the Court has found  
2                   cases that featured variable pricing in  
3                   the real world but in this courts  
4                   accepted the calculation of only one  
5                   price for all customers in the but for  
6                   world."

7                   Citing McDunna as an example.

8                   And then the next quote:

9                   "It is important not to let a  
10                  quest  
11                  for perfect evidence become the enemy  
12                  of  
13                  good evidence."

14                  THE COURT: Yeah, I note that both of  
15                  those cases, McDunna and Flonase, are Judge Brody  
16                  cases, and that's certainly good law, but I don't  
17                  think that's quite the issue here.

18                  The issue Mr. Coe raised was two  
19                  inconsistent -- or arguably inconsistent statements by  
20                  Dr. Beyer on the need for almost a million different  
21                  but for prices, and I think it was a comparison of the  
22                  pre-2005 -- the first period, 2005 period with the  
23                  post-2005 period where he said in a footnote, am I --  
24                  do I recall incorrectly? Didn't Dr. Beyer say in a  
25                  footnote that that --

1 MR. COE: Your Honor, he said that in  
2 the actual world it would be straightforward to  
3 account for these price tiers, but he could not do it  
4 in the but for world because he would need to do a  
5 million but for prices.

6 THE COURT: All right.

7 MR. COE: And it's both the same time  
8 periods, Your Honor.

9 THE COURT: Fine. In the -- he was  
10 talking about the pre-2005 period?

11 MR. COE: No, Your Honor, he was  
12 talking about the post-2005 --

13 THE COURT: Post.

14 MR. COE: -- period, but the actual  
15 world. So to determine damages he subtracts the but  
16 for price from the actual.

17 THE COURT: Yeah.

18 MR. COE: So on one side of that  
19 equation he says it's no problem to account for these  
20 price tiers in the actual world because all these  
21 prices in the tiers are in -- you know --

22 THE COURT: The government saves money  
23 by turning off the lights.

24 (Pause)

25 MR. CORRIGAN: They don't know you very

1 well, Your Honor.

2 THE COURT: Thank you, that's what I  
3 was thinking of. Go ahead, Mr. Corrigan.

4 MR. CORRIGAN: Your Honor --

5 THE COURT: Thank you, Mr. Cosgrove.

6 MR. COSGROVE: You're welcome.

7 MR. CORRIGAN: Your Honor, I think that  
8 -- I'm not sure exactly -- Dr. Beyer in my opinion --  
9 in my estimation has been consistent on that. I mean  
10 he's come up --

11 THE COURT: Well that statement, what  
12 about that statement?

13 MR. CORRIGAN: Well he's come up with  
14 22 -- again, 2200 but for prices, which is complex  
15 enough, but a million but for prices it's just  
16 unscientific, and as the Court pointed out, no court  
17 has ever asked anyone to do that.

18 THE COURT: Well but the footnotes, and  
19 I think they were both in footnotes, that were relied  
20 upon by Mr. Coe, in those footnotes Dr. Beyer treated  
21 real world prices and but for prices differently.

22 MR. CORRIGAN: Your Honor, I must admit  
23 I don't recall which footnotes; however, they might be  
24 in my notes, but I just don't recall that.

25 I did want to cite footnote 6 of the

1 Court's opinion, I'm not sure that gets at it, but it  
2 does get at the price dispersion --

3 THE COURT: Let me --

4 MR. CORRIGAN: -- that Mr. Coe  
5 referenced. I'm not sure if it's what you're talking  
6 about. Footnote 6 of the Court's opinion.

7 THE COURT: Let me look.

8 MR. CORRIGAN: It's on page --

9 THE COURT: No, I can find footnote 6.

10 MR. CORRIGAN: Okay. Now the Court --

11 THE COURT: I have it.

12 MR. CORRIGAN: Okay.

13 MR. CORRIGAN: Now the Court points out  
14 here that again we're being criticized for average  
15 prices, but as the Court points out in the middle of  
16 that footnote:

17 "Moreover, Dr. Bronstein compares  
18 average prices ..." -- and the Court  
19 used the italics -- "charged by

20 Immucor

21 and Ortho. The average prices are very  
22 similar through 2004."

23 The Court concludes:

24 "The diversions in prices after  
25 2004 is explained at least in part by

1 the discounts Immucor gave some of its  
2 customers through price protection and  
3 pricing tiers."

4 But Dr. Beyer describes all that, as  
5 the Court points out -- well actually I think it's  
6 paragraph 77 through 85 I was -- no, you cite  
7 Dr. Bronstein's report --

8 THE COURT: Yes.

9 MR. CORRIGAN: -- pointing out that he  
10 himself is using average prices in there.

11 THE COURT: He compares average prices  
12 charged by Immucor and Ortho.

13 MR. CORRIGAN: Yes.

14 Could I have slide 24 of our initial  
15 presentation? Your Honor, I have one more slide and  
16 then I'm obviously available for questions, and I  
17 think that would wrap it up for me.

18 THE COURT: Before we address the issue  
19 of what happens.

20 MR. CORRIGAN: Yes.

21 Your Honor, if you could take a look at  
22 slide 24 of yesterday's slide presentation. It's kind  
23 of -- I just like ending with this one because again  
24 it focuses on Ortho's use of costs, which we think is  
25 somewhat ironic considering the amount of argument

1 that's been on costs so far in this remand.

2 Your Honor, if you see this is an email  
3 from Jeremy Stackowitz (ph) who was an executive at  
4 Ortho, it's from October of 2007, and the highlighted  
5 language in paragraph 2 says:

6 "I'm becoming increasingly  
7 uncomfortable leaning heavily on the  
8 our

9 costs are all going up  
10 disproportionately to our price  
11 increase

12 and thus we're raising price as part of  
13 the message."

14 The next highlight, "In general it's  
15 not."

16 And here's the key point, "And it's not  
17 why we're taking price any way."

18 They're taking price, they say duopoly,  
19 we say conspiracy. They're not taking price because  
20 of a cost. Now they're telling their customers that,  
21 but that's not why we're taking price any way.

22 And then the very last highlighted  
23 part, "But I don't think the cost going up piece feels  
24 very true or relevant right now." And I'd say that's  
25 a good summary of some of what we've seen here as

1 well. And the last thing he signs off, "Sorry to be  
2 difficult." And here's a voice in the wilderness  
3 saying that the cost piece doesn't feel true.

4 THE COURT: Who is Richard  
5 Trastinschmit (ph)?

6 MR. CORRIGAN: Trastinschmit is another  
7 Ortho executive, I believe you saw some testimony from  
8 Ortho counsel yesterday, some live --

9 THE COURT: Oh, yes, yes, yes.

10 MR. CORRIGAN: -- a depo clip. And  
11 Stackowitz kind of summed up, he's sorry to be  
12 difficult. Sorry to be sort of calling us out on our  
13 phony cost explanation.

14 Your Honor, unless you have any  
15 questions of me other than the question you want to  
16 talk about at the end that's all I have.

17 THE COURT: No, the major question I  
18 had concerned the article.

19 MR. CORRIGAN: Would you like me to  
20 respond to that first?

21 THE COURT: You've done it. You've  
22 responded.

23 MR. CORRIGAN: Okay, yes. I thought  
24 the other issue.

25 THE COURT: No. No, no. What I think



1 we should address now, and there might be some other  
2 additional issues. I think we've covered the eight  
3 items on my original list.

4 The additional item, referenced by  
5 Mr. Antoine, yesterday concerns the case if I conclude  
6 that Dr. Beyer's model fails the Daubert testing, is  
7 there evidence of antitrust impact common to the  
8 class? Do I frame your issue properly?

9 MR. ST. ANTOINE: Yes, Your Honor.

10 THE COURT: Thank you.

11 MR. CORRIGAN: Your Honor, we would --  
12 to be frank it's unclear, but what we would say is we  
13 have cited five different pieces of common impact,  
14 five different types of evidence which the Court has  
15 credited to some extent, not all. Now Ortho has  
16 continually said none of these stand on their own, but  
17 of course none of them were proposed on their own.

18 The market structure and the pricing  
19 analysis, defendant's documents, the Bogosian  
20 shortcut, and then the damages methodology was used to  
21 prove impact, which goes beyond what the standard is.

22 No case, even at this climate, says you  
23 have to prove impact at the class cert stage. But  
24 that's what we did in this case, and that's given them  
25 sort of the opportunity to challenge our damages

1 methodology in the impact arena.

2 But what our market structure and the  
3 other evidence shows is something I've said time and  
4 again, whatever happened in this case, Your Honor,  
5 happened to all people and all entities. Ortho has  
6 never suggested that the duopoly pricing affected  
7 different customers differently, and we say the same  
8 about conspiracy pricing. So whatever happened to  
9 customers by duopoly or by conspiracy happened to them  
10 all. That's a common question and it's clearly a  
11 merits question that doesn't have to be decided at  
12 this time.

13 Now at trial we'll have to prove the  
14 conspiracy, but if we do prove a conspiracy it'll be  
15 evidence that there's -- that all the market -- all  
16 the customers were impacted by the conspiracy.

17 Now, I know Mr. St. Antoine will say,  
18 but how do we measure? That's what a damages  
19 methodology does. Not just in this case, in every  
20 case. In every case the damages methodology has to  
21 distinguish between lawful conduct and unlawful  
22 conduct.

23 Now they say that this case is so  
24 unusual because of its duopoly, but every damages  
25 methodology has to distinguish the illegal effects and

1 the legal effects, whether it's duopoly or anything  
2 else. So, I would say that there still is common  
3 impact.

4 Now we -- you know, we certainly hope  
5 that the damages methodology doesn't get bounced, but  
6 we've offered significant evidence.

7 The Bogosian shortcut, although it was  
8 disparaged somewhat by Hydrogen Peroxide, basically  
9 just distinguish it. So the Bogosian shortcut -- and  
10 the Bogosian shortcut, I'm attempted to show you one  
11 more slide, Your Honor, but I won't. The Bogosian  
12 shortcut is captured by a document in this case better  
13 than any document I've seen, and that's the choo choo  
14 train.

15 Ortho has a choo choo train pricing, it  
16 came with the BBLP and it shows the choo choo train  
17 and the engine is the list price, and all the other  
18 cars are discounted off list price, and in case you  
19 were wondering what it meant, they say right on that  
20 every  
21 -- all prices changes lock step with the list price.  
22 All cases -- it's a normal argument that plaintiffs  
23 always say list price was fixed and defendants always  
24 say the list price is too far attenuated from actual  
25 prices. But in this case that's not so. Their own

1 document says whatever happened to list price happens  
2 to all prices in the lock step. That's what the  
3 Bogosian shortcut says in one document.

4 And then in addition to that --

5 THE COURT: What is that document?

6 MR. CORRIGAN: I'll show you, Your  
7 Honor. Oh, we have the slide, Your Honor, I'm sorry,  
8 we can do that just by slide. It's the last -- it's  
9 slide 59 in yesterday's presentation. The words are  
10 somewhat blurry, Your Honor, but you know the second  
11 and fourth -- first and third bullet points are  
12 highlighted. "Pricing expressed as a percentage  
13 discount off list price." So here's there's no  
14 argument about the relationship from the list price to  
15 the charged prices.

16 And the third one makes it very plain,  
17 "As list price increases by duopoly or conspiracy all  
18 customer prices change in lock step." That's common  
19 impact in a nutshell.

20 Now we add to that with a declaration  
21 from Teresa Heplin (ph), she's an Immucor executive,  
22 and what she says is, Immucor prices were based on  
23 Ortho's list price. So that gives us the caboose.

24 Now this train is not only driving all  
25 of Ortho's prices, it's also driving Immucor's prices.

1 That's common impact in a nutshell, Your Honor.

2 Now the short answer of that is if we  
3 lose Dr. Beyer's damages methodology, which should be  
4 viewed under the moral acts Story Parchment standard,  
5 we still have common impact under the choo choo train  
6 model, the market structure analysis, the defendant's  
7 documents, the Bogosian shortcut, and Dr. Beyer's  
8 pricing analysis.

9 THE COURT: I'd like a legible copy of  
10 this choo choo train.

11 MR. CORRIGAN: Dr. Beyer cites another  
12 version of this in his report. I don't know if it  
13 mentions the lock step language. Do we have that?  
14 Could you give me the cite on that, please.  
15 Dr. Beyer's version so that the Court can get a little  
16 bit better look at it.

17 THE COURT: It's Exhibit 143.

18 MR. CORRIGAN: Okay, Your Honor, it's  
19 not -- the language is not as good in this version,  
20 but on page 34 of Dr. Beyer's report -- not his reply  
21 report -- at the very top of that talks about  
22 traditional VB pricing strategy, and it's pretty clear  
23 what it's talking about. It's more legible, but it  
24 doesn't have the lock step agreement -- lock step  
25 language, which is why we used this as the slide.

1                   THE COURT: Can you produce a better  
2 copy of this exhibit or no?

3                   MR. CORRIGAN: We can try, Your Honor,  
4 but I doubt it.

5                   THE COURT: By the way what does HOF in  
6 the upper left --

7                   MR. CORRIGAN: Oh, I'm sorry. That was  
8 a holdover. In our initial presentation to Your Honor  
9 almost three years ago I labeled all these documents  
10 as hall of fame, caliber, common impact documents, and  
11 for the hall of fame we put a little plaque on there  
12 to give it the recognition we thought it deserved, and  
13 that's a bit of a holdover.

14                  THE COURT: I'm glad I forgot that.

15                  MR. CORRIGAN: Yes. That and the  
16 Robinson case and I'm going to be out of here very  
17 shortly.

18                  So, Your Honor, in a nutshell we say  
19 even if Dr. Beyer's methodology -- damages methodology  
20 doesn't survive that we still do have common impact,  
21 but the damages methodology is reviewed under a more  
22 relaxed standard as Story Parchment.

23                  THE COURT: And you're relying on the  
24 Bogosian shortcut, the proof of common impact --

25                  MR. CORRIGAN: Yes.

1 THE COURT: -- through Beyer that does  
2 not fall because of the damages model --

3 MR. CORRIGAN: Yes.

4 THE COURT: -- if that falls. Market  
5 structure analysis, empirical pricing, which is what  
6 we're talking about in exhibit -- slide 59 and some  
7 defendant's documents.

8 MR. CORRIGAN: Yes.

9 So we cited quite a lot of different  
10 types of evidence, all of which this Court credited to  
11 some degree or another, and we confirmed Dr. Beyer's  
12 initial conclusions with the damages methodology,  
13 which is what every damages methodology does. By  
14 measuring damages it confirms common impact, but it's  
15 not the only proof of common impact.

16 Here it was, we went farther than we  
17 had to, but it's not the only and it doesn't have to -  
18 - it's not necessary.

19 THE COURT: Thank you.

20 MR. CORRIGAN: Thank you, Your Honor.

21 THE COURT: Mr. St. Antoine.

22 MR. ST. ANTOINE: Your Honor, I'm going  
23 to try to make this argument without reference to  
24 Mr. Coe's set of LEGOs, although I'm tempted to do so.

25 THE COURT: I note that Mr. Coe has

1 removed his LEGOs.

2 (Laughter)

3 THE COURT: Good. You can leave your  
4 files here, I want to LEGOs out of here though.

5 MR. COE: Be in trouble if I left the  
6 LEGOs behind, Your Honor.

7 MR. ST. ANTOINE: First I think it's  
8 important to explain what antitrust impact is. We've  
9 used that word obviously a number of times. It is the  
10 fact of damage, and it's --

11 THE COURT: Antitrust -- it's injury.

12 MR. ST. ANTOINE: It's injury. And in  
13 economic terms what it means is showing that the  
14 actual price is higher than the estimated but for  
15 price.

16 If plaintiffs are able to demonstrate  
17 that actual prices charged to the customers were above  
18 a reliable estimate of but for prices they can show  
19 the fact of injury. And then you get into the  
20 question about what is the quantity, the delta between  
21 the actual and the but for price.

22 Conversely if there is no ability to  
23 show what the but for price is --

24 THE COURT: Through common evidence.

25 MR. ST. ANTOINE: -- through common



1 evidence and all you have is the actual price, there's  
2 no ability to show that element of common proof of the  
3 case.

4 And here it's particularly important to  
5 have a reliable model, because as the courts  
6 recognized and as Dr. Beyer acknowledges, with the  
7 change in market structure to a duopoly you can  
8 anticipate price increases even in the absence of the  
9 conspiracy. And when asked about this at his hearing,  
10 Your Honor, and I'm referring to specifically pages --  
11 page 384,  
12 Dr. Beyer --

13 THE COURT: Of the hearing transcript.

14 MR. ST. ANTOINE: Of Dr. Beyer's  
15 hearing transcript, correct. He recognizes that  
16 duopolists --

17 THE COURT: Wait Dr. Beyer's hearing?

18 MR. ST. ANTOINE: Dr. Beyer's hearing  
19 testimony.

20 THE COURT: He didn't testify at the  
21 class certification hearing, he testified later as I -  
22 -

23 MR. ST. ANTOINE: That's right.

24 THE COURT: He was unable to attend.

25 MR. ST. ANTOINE: Exactly right.

1 THE COURT: So you're talking about his  
2 deposition given at the end of July, according to my  
3 records.

4 MR. ST. ANTOINE: Yes, but we -- both  
5 sides I think they're referring to it as his hearing  
6 testimony to distinguish it from --

7 THE COURT: Although it was a  
8 deposition. I understand.

9 MR. ST. ANTOINE: -- from his earlier  
10 deposition, correct.

11 THE COURT: And it was conducted about  
12 two or three weeks after the class certification  
13 hearing.

14 MR. ST. ANTOINE: Exactly.

15 THE COURT: Right. Go ahead.

16 MR. ST. ANTOINE: So Dr. Beyer  
17 recognizes that even in the absence of a cartel that  
18 duopolists, to use his colorful phrase, "Unless their  
19 blind and deaf," will engage in interdependence --  
20 mutual interdependence in their pricing decisions, and  
21 as a result prices can increase in the absence of a  
22 conspiracy between a competitive price all the way up  
23 to a monopoly price.

24 Now to be fair, Dr. Beyer wasn't  
25 opining that in the absence of a conspiracy that

1 Immucor and Ortho would charge a monopoly price, but  
2 he is acknowledging that in the but for world that  
3 price is going to be somewhere in that range. Prices  
4 are going to increase and they're going to be  
5 somewhere between a competitive market price and a  
6 monopolist price. And the only source of common proof  
7 proffered by the plaintiffs that purports to estimate  
8 that but for  
9 price --

10 THE COURT: Is Dr. Beyer.

11 MR. ST. ANTOINE: -- is Dr. Beyer's  
12 model, which plaintiffs describe as his damages model,  
13 but they have also labeled it as an element of  
14 antitrust impact.

15 And Mr. Corrigan is correct to point  
16 out they've identified five types of proof that they  
17 say are common evidence of impact, but number five is  
18 his damages model, and is the only one that even  
19 attempts to estimate what that but for price is. How  
20 much would prices go up in this duopoly market in the  
21 absence of the alleged conspiracy? And if you take  
22 that away, and in this proceeding Ortho has advocated  
23 that when they're a Daubert standard that element  
24 should be taken away, plaintiffs don't have any basis  
25 to establish that but for prices were lower than

1 actual prices.

2 Now let's talk about those other  
3 elements. The Bogosian presumption. Mr. Corrigan is  
4 right to reference Hydrogen Peroxide decision, because  
5 in that decision it actually cited back to Your  
6 Honor's decision in the linerboard where the Bogosian  
7 presumption was treated as a belt and suspenders in  
8 conjunction with Dr. Beyer's economic work in  
9 linerboard. And Hydrogen Peroxide casts serious doubt  
10 about going forward based solely on the Bogosian  
11 presumption, and specifically it cited the 2003  
12 amendments to Rule 23 and the prospect of presuming  
13 antitrust impact solely based on the fact that you  
14 have an antitrust conspiracy.

15 In Hydrogen Peroxide there's not a  
16 basis to rely solely on Bogosian presumption. What  
17 plaintiffs have done is coupled that argument on --  
18 with a damages model.

19 We would also add to the legal  
20 discussion of Hydrogen Peroxide by pointing out that  
21 because of the change in market structure that we've  
22 been discussing, it would be all the more  
23 inappropriate to presume impact simply because there  
24 have been a claim and even proof of a conspiracy. You  
25 have to separate that element of a conspiracy from the

1 separate element of antitrust impact.

2 Now as to the other elements, which the  
3 Court did address in its earlier decision, I want to  
4 cover those briefly as well, Your Honor.

5 So number one in Your Honor's earlier  
6 decision and discussion was on the Bogosian  
7 presumption.

8 Number two --

9 THE COURT: What page? Just tell me  
10 what page you're referring to.

11 MR. ST. ANTOINE: So the discussion of  
12 the different elements of common proof start on -- at  
13 the federal report decision at 235. The decision of  
14 the Bogosian presumption goes on to approximately --  
15 it looks like 236.

16 THE COURT: I'm there.

17 MR. ST. ANTOINE: Then the Court  
18 discusses market structure.

19 And I think it's first important to  
20 identify that even in the earlier decision Your Honor  
21 -- the finding wasn't that market structure alone  
22 would be sufficient to establish impact, only that it  
23 was supporting a finding of predominance, but more  
24 specifically relating to the earlier discussion market  
25 structure -- and we're talking about barriers to entry

1 and concentration -- specifically a duopoly can also  
2 be conducive to lawful price increases like price  
3 leadership.

4 So simply opining that the market  
5 structure was conducive to price increases doesn't say  
6 whether or not conspiratorial prices would be higher  
7 than the but for price leadership prices. It's not  
8 enough again for a finder of fact to make the decision  
9 about fact of injury.

10 Likewise, Your Honor, the third  
11 element, the empirical pricing analysis -- well, I  
12 think the most -- the clearest thing I can point to is  
13 Your Honor's own finding that the Court does not find  
14 that Dr. Beyer's empirical pricing analysis is  
15 persuasive as his market analysis or the results of  
16 his damages model.

17 And I think the most simple way to  
18 explain that is that just observing that pricing went  
19 up in the marketplace, given the change in market  
20 structure, isn't going to allow you to conclude that  
21 but for prices were lower than actual prices. All you  
22 can conclude from those empirical pricing documents,  
23 as the Court earlier observed in its initial decision,  
24 is that prices went up.

25 THE COURT: Well, I don't think I said

1 in my initial decision in the portion dealing with  
2 antitrust impact beginning at page 235 that without  
3 Dr. Beyer's damages evidence antitrust impact could  
4 not be established did I?

5 MR. ST. ANTOINE: I don't think Your  
6 Honor did say that.

7 THE COURT: I don't think I did.

8 MR. ST. ANTOINE: I don't think Your  
9 Honor did say that.

10 THE COURT: Did I say that without his  
11 -- and I'm reading it again. When I reread this  
12 opinion in connection with the argument I didn't focus  
13 on this point. But I don't think I -- well did I say  
14 that antitrust impact could be established by evidence  
15 other than Dr. Beyer's evidence of damages?

16 MR. ST. ANTOINE: I would -- my reading  
17 of Your Honor's earlier decision is that the Court  
18 didn't make a holding on either one of those points,  
19 and of course it didn't need to because the Court  
20 accepted --

21 THE COURT: Beyer.

22 MR. ST. ANTOINE: -- Beyer. Exactly.

23 Then lastly the fourth element on -- is  
24 defendant's documents, and.

25 THE COURT: What I say there is:

1                    "These documents would not suffice  
2                    to prove impact on their own, but they  
3                    lend support to a finding of  
4                    predominance."

5                    MR. ST. ANTOINE: Yes. Exactly.

6                    And again to reiterate, if you're  
7                    asking the question that must be asked to decide the  
8                    separate element of antitrust impact you have to ask  
9                    the question where actual prices above but for prices?  
10                  And if you take away Dr. Beyer's model you can't  
11                  answer that question.

12                  So we make the argument that a finding  
13                  under a Daubert standard that renders his model  
14                  unreliable precludes the plaintiff's ability to meet  
15                  their burden of showing predominance under Rule  
16                  23(b)(3).

17                  And we cite some cases at the end of  
18                  our opening brief where courts have gone from the  
19                  conclusion that the expert's testimony is unreliable  
20                  to the ultimate conclusion that the elements of Rule  
21                  23 have not been satisfied.

22                  Thank you.

23                  THE COURT: Thank you.

24                  MR. COE: Your Honor, can I respond to  
25                  two or three comments that Mr. Corrigan made going



1 back to the cost and RhoGAM benchmark?

2 THE COURT: Yes.

3 MR. COE: The first point I wanted to  
4 make was the timing of Ms. Kleinbard's testimony. And  
5 plaintiffs are correct that Ms. Kleinbard came -- was  
6 in the RhoGAM business from 2001 to 2003 and then came  
7 back --

8 THE COURT: And then back in --

9 MR. COE: -- in 2005 and 2008. But  
10 what's important here is in the line of questioning  
11 that plaintiffs point to, and also that Dr. Beyer  
12 points to in his report as support for his opinion  
13 that Talecris was not an active competitor, is this  
14 line of questioning that they cite on page 33 of their  
15 slides where she says she's just talking about 2001 to  
16 2003.

17 Later in the deposition, like any good  
18 lawyer, Mr. Corrigan continued to the later time  
19 period when she came back, and that was one of the  
20 clips that we played, Your Honor, when she said that  
21 in 2005 after the entry of Rhophylac there were three  
22 competitors and that Talecris continued to compete on  
23 price. And that's the time period that's important,  
24 Your Honor, that's the one where Dr. Beyer uses this  
25 benchmark.

1 And Joshu, if you could pull up  
2 slide 51.

3 Mr. Corrigan criticized me for  
4 selectively highlighting from paragraph 72, which is  
5 of course true, but now I want to read that whole --  
6 this whole entire first two sentences.

7 MR. CORRIGAN: I was shocked, Your  
8 Honor.

9 (Laughter)

10 MR. COE: "Since their entry into this  
11 market in 2004 CSL and Talecris have competed  
12 aggressively against one another as the only two ..."  
13 -- this is in parens -- "(relatively low price  
14 suppliers of Rho-D)."

15 It goes on to say:

16 "The only other Rho-D supplier,  
17 Ortho Clinical Diagnostics, has stayed  
18 out of the fray maintaining its  
19 position

20 as a premium higher priced supplier."  
21 So Ortho doesn't compete on price, it  
22 competes by being a premium brand.

23 And if we go back to Kleinbard  
24 Exhibit 10, which we looked at earlier, and go to page  
25 3 of that document, under key objectives, what was

1 Ortho's objective in 2008? It was protect volume,  
2 price, and growth profit by maintaining U.S.  
3 leadership position, 70 percent market share, continue  
4 to build the equity of the brand in current markets,  
5 seek new market opportunities. It's key strategy was  
6 increase professional and patient brand awareness and  
7 loyalty.

8 THE COURT: So you're saying they were  
9 an active competitor?

10 MR. COE: First of all, Your Honor,  
11 they had a 70 percent market share, so I think it's  
12 pretty absurd to suggest they weren't a competitor in  
13 this market.

14 But second this is J&J, this is their  
15 strategy, they compete as the brand. You can buy --  
16 they make bandaids, for example, and Johnson & Johnson  
17 Bandaids cost more than your CVS bandaids, because  
18 Johnson & Johnson has a brand name that's important to  
19 them. Same thing with RhoGAM product.

20 Now I'll very quickly go back to this  
21 article, Your Honor, and you know we referenced this  
22 earlier but I think what's interesting here is that --  
23 is Mr. Corrigan and I trying to interpret this  
24 article, because Dr. Beyer didn't cite this article or  
25 rely on this article, so We've made this point before,

1 but

2 Mr. Corrigan is a very good lawyer, but he's not  
3 plaintiff's economic expert.

4 So we owe you a case on this point, but  
5 we don't think Mr. Corrigan can build this case for  
6 you.

7 but very quickly my reading of this  
8 article is that the theory of this cost mark-up method  
9 is that in the long run, in a competitive market, cost  
10 determine price. So if you have a competitive market  
11 you look at cost to determine what price will be in  
12 the future. But as Your Honor read, if you're using  
13 the method you have to keep in mind that if the but  
14 for world has imperfect competition that non-collusive  
15 price may be well above cost. So --

16 THE COURT: And what it doesn't say and  
17 this method of proving the issue may not be used.

18 MR. COE: It doesn't, Your Honor, but  
19 we would argue it doesn't fit because it only fits in  
20 a competitive market.

21 Last point, Your Honor, and I know I'm  
22 really trying my luck here, but I want to go back to  
23 Dr. Bronstein's testimony on cost. Page 244 to 245.

24 THE COURT: Yes, I have that.

25 MR. COE: 245 is where you were looking

1 at. Just to put it in context starting on page 244  
2 this line of questioning was about Dr. Beyer's failure  
3 to use regression analysis. Mr. Corrigan says:

4 "In your deposition back in March  
5 we discussed a little bit about  
6 regression and I asked if you could do  
7 regress and you said you thought it  
8 would not be easy."

9 And this is -- that was starting at  
10 line 16, Your Honor, and Dr. Bronstein agrees it would  
11 be difficult. And Mr. Corrigan says, "And that's  
12 because regression depends on reliable data does it  
13 not?" Et cetera, et cetera.

14 So the context of this quote you read  
15 before is in this discussion of whether it's  
16 appropriate to use or whether Dr. Beyer could have  
17 used an regression analysis, he wasn't addressing the  
18 question of whether it was important for Dr. Beyer to  
19 ignore cost in the first half of the class period.

20 On page 245 Mr. Corrigan -- at line 2  
21 Mr. Corrigan asks:

22 "What's the basis of Dr. Beyer's  
23 conclusion that he wasn't going to rely  
24 on Ortho cost data?"

25 And this is the key sentence that you

1 read, Your Honor. It says:

2 "There was information provided  
3 from Ortho that they recharacterize  
4 cost  
5 from time to time and as a result the  
6 cost data that you had requested  
7 wouldn't be comparable from year to  
8 year."

9 And we would again say the only  
10 information in the record that any of Ortho's cost  
11 data was unreliable was limited to standard cost, and  
12 it -- the explanation of why it was unreliable matched  
13 up almost exactly with Dr. Bronstein's testimony.

14 THE COURT: No the only answer to that  
15 is in the testimony on page 244, I don't know that  
16 we've read it before, after saying that -- I asked you  
17 -- this is your question, Mr. Coe.

18 "Q I asked you if you could do  
19 a regression and you said you thought  
20 it  
21 would be easy. Is that fair to say?

22 A I said it would be --

23 Q It would not be easy; is  
24 that  
25 fair to say?

1                           A        I said it would be  
2   difficult,  
3                           yes.

4                           Q        And a regression depending  
5   on  
6                           reliable data does it not?

7                           A        Yes, of course."

8                           And then this raised, "As does any  
9   benchmark that you're using."

10                          And then that -- you pointed out to  
11   something -- some part of the evidence -- the  
12   testimony that would suggest that he was answering  
13   with respect to a regression model but for the fact  
14   that he says yes without reliable data it would no be  
15   easy to do regression. But then he says that's true.  
16   And I'll read it again. "And of course -- yes, of  
17   course, as does any benchmark that you are using."

18                          This is something I'm going to have to  
19   think about. I'm not ruling on it.

20                          MR. COE: Thank you, Your Honor.

21                          THE COURT: Good job in trying to  
22   rehabilitate Dr. Bronstein years after his deposition  
23   was taken.

24                          It's been a long several days. We've  
25   got some things that are owed. A list of the

1 documents. We have a copy of the letter on costs. I  
2 think there was something else.

3 (Pause)

4 THE COURT: We've done some research on  
5 the cost to mark-up issue and have found no other  
6 cases on cost mark up. What we're talking about this  
7 article that -- entitled, "Quantification of damages."

8 Two things. Are there any other  
9 articles or have you found any cases using the cost  
10 mark-up method?

11 Now was there anything else that I  
12 asked you during the course of these two days to --

13 MR. ST. ANTOINE: Your Honor, you asked  
14 for a case from us.

15 THE COURT: Oh, yes.

16 MR. ST. ANTOINE: On the benchmark.

17 THE COURT: That was --

18 MR. ST. ANTOINE: I have not forgotten.  
19 I don't recall anything else, Your Honor.

20 THE COURT: Okay. And you'll get it to  
21 me by tomorrow?

22 MR. ST. ANTOINE: Yes, Your Honor.

23 THE COURT: Good. Well, I'm not  
24 leaving you much time, it's almost tomorrow.

25 I've thoroughly enjoyed these two days.



1 Some people might think I'm nuts for thoroughly  
2 enjoying these two days, but I have. It's what I  
3 thought of when I got the call from the president in -  
4 - well many years ago asking me if I wanted to accept  
5 the nomination, and I think it's the stuff that makes  
6 this job very, very interesting. It was very well  
7 presented.

8 First of all I started the proceeding  
9 by telling you I didn't like the way you organized the  
10 arguments in your briefs, and I came up with an  
11 argument analysis or order of my own. You quickly  
12 adapted, and I think your presentation was thorough  
13 and very depth, and I enjoyed every minute of it.

14 I'm going to take the case under  
15 advisement. I'm going decide it very quickly,  
16 hopefully.

17 And I'm going to ask this question, is  
18 there anything else that we need to address with the  
19 case in this posture? You've finished discovery.

20 MR. CORRIGAN: I don't think so, Your  
21 Honor. I'm not aware of anything.

22 THE COURT: I've got to rule on this  
23 and then schedule further proceedings.

24 MR. ST. ANTOINE: Yeah, I agree with  
25 Mr. Corrigan.

1                   THE COURT: Have there been any  
2 settlement discussions along the way? I know the case  
3 was at rest after you argued it in the Court of  
4 Appeals, but did anyone suggest any settlement  
5 discussions?

6                   MR. CORRIGAN: I'm going let Paul  
7 handle that one, Your Honor.

8                   MR. ST. ANTOINE: There have not been  
9 since the case has been up on appeal.

10                  THE COURT: Well now that the case is  
11 back and before me again and you've heard -- we've had  
12 two days of oral argument and you've heard my  
13 questions -- and my questions were designed to just  
14 feel the weaknesses and the strengths in your  
15 respective positions, they shouldn't give you any  
16 comfort you can't really determine much from the way  
17 I've questioned you, and you shouldn't.

18                  Having said that is there anything  
19 about the proceeding that have -- we've just ended  
20 that tells you you might want to consider settling?  
21 And would it be appropriate to ask that you discuss  
22 this or to direct that you direct this and submit a  
23 joint report telling me yes or no on settlement? And  
24 if no whether you think -- and I think this would  
25 require a private

1 -- this is the type of case that would require some  
2 form of alternative dispute resolution other than our  
3 court annexed dispute resolution. I don't think --  
4 certainly not our mediation program. We have a court  
5 annexed mediation program. I don't think it suits --  
6 it's suitable for MDM category cases. But there's  
7 also other ADR. Court annexed conferences with a  
8 magistrate judge, and maybe this is too much to ask of  
9 a magistrate judge, and then there's private ADR.

10 MR. ST. ANTOINE: Your Honor, this is  
11 one of those issues where I don't like to get out in  
12 front of my client.

13 THE COURT: You don't want to get out  
14 ahead. So supposing I issue an order directing that  
15 you -- I'll frame the order -- any interest in  
16 discussing settlement before I rule on the remand  
17 issues or after I rule on the remand issues. That way  
18 -- that's the advantage of an order like that, it  
19 forces you to address issues. And you can say no, no  
20 issue and no interest or yes. I think I'll do that.

21 Let's discuss timing. I'll get it out  
22 right away and I'll talk about discussing settlement  
23 before I rule or after I rule. And you can -- I want  
24 a joint report. I'll frame the question. But the  
25 reason for the order is to avoid putting you in the

1 position in which I have put you.

2 MR. ST. ANTOINE: I noticed that, Your  
3 Honor.

4 THE COURT: Having you get out in front  
5 of your client or having you make a statement about  
6 settlement, which may or may not influence the way the  
7 other side -- the way Mr. Corrigan thinks of the  
8 defense position, so I won't do that. I'll issue the  
9 order.

10 MR. ST. ANTOINE: Thank you, Your  
11 Honor.

12 THE COURT: Now is there anything else  
13 we have to do?

14 MR. ST. ANTOINE: I don't believe so.

15 MR. CORRIGAN: I don't believe so, Your  
16 Honor.

17 THE COURT: It's quarter of 7:00.  
18 We're adjourned. Thank you all very much.

19 THE BAILIFF: All rise.

20 (Proceedings concluded at 6:46 p.m.)

21 \* \* \* \* \*

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CERTIFICATION

I, Sheila G. Orms, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter.

Dated: July 26, 2015



Signature of Approved Transcriber

AAERT Certified Electronic Transcriber CET\*\*D-408

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